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CASE NO.: _____

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

BANK OF JACKSON COUNTY,

Petitioner,

vs.

L. JAMES CHERRY and RAYMOND G. NAEYAERT,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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78 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether The First Amendment Right To Petition The Government For Redress Of Grievances Clearly Forbids Officials Of The Farmers Home Administration (FmHA) From Debarring The Bank Without Due Process Of Law From Participating In FmHA Loan Guarantee Programs, When The Purpose Of The Debarment Is To Force The Bank To Abandon Or Compromise Its Position In A Civil Dispute With The FmHA

2. Whether The Debarment Of The Bank Without Due Process Of Law From Further Participation In FmHA Loan Guarantee Programs, Coupled With Allegations Of Dishonest Or Fraudulent Conduct, Infringes A Clearly Established, Protected

Liberty Interest

3. Whether The Bank's Right To Compete On An Equal Footing With Others For FmHA Loan Guarantees Is A Clearly Established Property Interest Which Cannot Be Extinguished Without Due Process Of Law

LIST OF ALL PARTIES

Pursuant to Supreme Court Rules 14.1(b) and 29.1, Petitioner states that all persons and entities who were parties to the judgment whose review is here sought are named in the caption, and that the Bank of Jackson County has no parent or subsidiary corporation.

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REPORTS OF OPINIONS BELOW

Opinions of the Eleventh Circuit Court of Appeals herein are reported at:

1. ***Bank of Jackson County v. Cherry***, 980 F.2d 1354 (11th Cir. Fla. 1992) (originally reported at 966 F.2d 1406);
2. ***Bank of Jackson County v. Cherry***, 980 F.2d 1362 (11th Cir. Fla. 1993) (on rehearing).

GROUNDS ON WHICH JURISDICTION INVOKED

Jurisdiction is invoked to review the judgment on rehearing of the Eleventh Circuit Court of Appeals, entered January 11, 1993. ***Bank of Jackson County v. Cherry***, 980 F.2d 1362. That opinion replaced an earlier 2-1 opinion rendered by the same panel and later withdrawn, 980 F.2d 1354.

The discretionary certiorari jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision conflicts with decisions of other United States court of appeals on the same and similar matters. The decision treats important federal constitutional questions in a way that conflicts with applicable decisions of this Court or deals with questions that have not been, but should be, settled by this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

I. **U.S. CONST. amend. I:**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II. **U.S. CONST. amend. V:**

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in

time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

III. 7 C.F.R. Ch. XVIII, Part 1924, Subpart E, §§ 1924.201-1924.220 (1988), governs suspension and debarment proceedings undertaken by the Farmers Home Administration. The most pertinent provisions are here set out verbatim:

§ 1924.201 Purpose.

This subpart prescribes the action to be taken by the Farmers

Home Administration (FmHA) when there is need for administrative action against any person, or any representative or affiliate thereof.

§ 1924.202 Policy and scope.

This subpart applies to both individual--and group-type loans or grants in connection with any program administered by FmHA. Any action to be taken under this subpart is to be corrective or for the protection of the public interest.

§ 1924.203 Definitions.

(a) *Person.* For the purposes of this subpart a person is an individual, unincorporated association, trust, corporation, partnership, or other entity, such as a purchaser, builder, contractor,

dealer, supplier, manufacturer, realtor, surety, insurance company, broker, packager, salesman, escrow agent, sales agent, lender, holder, engineer, architect, inspector, or attorney, or any representative, affiliate, or successor in interest thereof.

(b) *Debarment*. Debarment is the exclusion from participation in any FmHA program for a reasonable period of time commensurate with the seriousness of the person's offense or failure, or the inadequacy of his performance.

(c) *Suspension*. Suspension is the temporary disqualification from FmHA programs in conjunction with debarment proceedings.

* * *

§ 1924.213 Sanctions.

(a) *General.* Debarment and suspension are drastic actions which may severely affect the economic well-being of the persons debarred or suspended. They shall not be based upon an unsupported accusation. In assessing whether adequate evidence exists for invoking this procedure, consideration should be given to the amount of credible evidence which is available, to the existence or absence of corroboration as to important allegations, as well as to the inferences which may be properly drawn from the existence or absence of affirmative facts.

(b) *Debarment.* Debarment may be imposed by the State Director,

for a specified period of time, generally not to exceed 3 years, except in more serious cases. Debarment may also be imposed for an indefinite period of time, pending correction of the conditions which led to the debarment.

(c) *Suspension.* Suspension may be temporarily imposed by the State Director pending the debarment determination only when immediate action is necessary to protect the interest of the FmHA and its program borrowers or grantees. The interests of the person to be suspended must be reasonably deemed to be of less importance than that of FmHA or its program participants. Suspension must be based on adequate evidence supporting at least one of

the grounds listed under § 1924.214. When a debarment determination adverse to the person is appealed, suspension also may be imposed for the appeal period only.

* * *

IV. 7 C.F.R. Ch. XVIII, Part 1980, Subpart A, §§ 1980.1-1980.100 (1988), contains general regulations applicable to the FmHA's guaranteed loan programs. Particularly pertinent here are the following:

* * *

§ 1980.6 Definitions and abbreviations.

* * *

(a)(14) *Lender.* The person or organization making and servicing the loan or advancing and servicing the line of credit which is

guaranteed under the provisions of the appropriate Subpart. The lender is also the party requesting a guarantee.

* * *

§ 1980.13 Eligible lenders.

* * *

(b) *An eligible lender is:*

Any Federal or State chartered bank, Federal Land Bank, Production Credit Association, Bank for Cooperatives, Savings and Loan Association, Building and Loan Association, mortgage company that is a part of a bank-holding company, or an insurance company that is regulated by the National Association of Insurance Commissioners. The above entities must be subject to credit examination and supervision by

either an agency of the United States or a State. * * * Only those lenders listed in this paragraph are eligible to make and service guaranteed loans and such lender must be in good standing with its licensing authority and has [sic] met licensing, loanmaking, loan servicing, and other requirements of the State in which the collateral will be located, and the loanmaking and/or loan servicing office requirements in paragraph (b)(3) of this section. A lender must have the capability to adequately service the loan for which a guarantee is requested.

* * *

(5) *Debarment.* See Part 1924, Subpart E of this chapter.

* * *

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Bank of Jackson County [hereinafter "the Bank" or "BJC"] , a small Northwest Florida state-chartered bank since 1934, with offices in Graceville and Marianna, Florida, participated as an eligible lender in Farmers Home Administration programs since 1980. Twenty to twenty-five percent of its outstanding loans were agricultural. From 1984 through June 1988, the FmHA had guaranteed Bank of Jackson County loans and lines of credit totalling $1,065,990.95.

Defendant L. James Cherry was the Florida State Director of the Farmers Home Administration [hereinafter FmHA] since 1985 (except for the period June 22, 1988 to December 1, 1988). As such,

he has authority over all FmHA operations in Florida. Previously, he worked for the FmHA in Washington, D.C. He was admitted to the Florida bar in 1972 and practiced law in Florida before his employment with the FmHA. Defendant Raymond G. Naeyaert was Florida Chief of Farmer Programs, second only to Cherry in all matters concerning farmers and farming in Florida, since the early 1980s, and worked for the FmHA since 1978.

Throughout the 1980s, the Bank of Jackson County and the FmHA had an on-going business relationship, which included co-participation in loans to farmers, the Bank's issuance of loans to farmers guaranteed by FmHA, and the Bank serving as a depository for the FmHA's treasury limited account.

In 1982, a dispute arose between the Bank and FmHA concerning the distribution of funds collected for the sale of cows repossessed from the Ferrises, dairy farmers in Graceville, Florida, who had borrowed money from both lenders. For approximately four years, up to July 15, 1986, the parties attempted but were unable to resolve the dispute over how these funds should be divided. Between July 15, 1986 and April 15, 1988, there was no communication, oral or written, between the BJC and FmHA or its agents, concerning the Ferris cow proceeds dispute. During this period, the Bank and FmHA engaged, amicably, in numerous loan transactions. Defendants Cherry and Naeyaert were aware of no problems in FmHA's working relationship with the Bank other than the dispute over the

distribution of the Ferris cow proceeds.

On April 14, 1988, Defendant Naeyaert was present at the Holmes County, Florida FmHA office. From his county supervisor, J. Aubrey Sapp, he learned of the imminent issuance of a conditional commitment on a loan guarantee to the Bank on a loan to farmer Adron Miller. Naeyaert told Sapp that FmHA "shouldn't be working with them [i.e., the Bank]" because of "past business dealings on Elmer and Shirley Ferris." He instructed Sapp not to issue the conditional commitment on the Miller loan and not to issue "anything on . . . any other case to [the] Bank of Jackson County." The next day, Sapp phoned Bank vice president Heisler and informed him of Naeyaert's instructions.

The commitment was subsequently issued to a different bank.

On June 10, 1988, the Bank received a letter dated June 1, 1988, from Cherry (drafted by Naeyaert), terminating the business relationship with the Bank and announcing that FmHA would not enter into any further loan guarantees of BJC loans and would terminate its Treasury Limited Account at the Bank. The letter cited the Ferris cow dispute and stated:

> We have honestly tried to negotiate a settlement of this issue to no avail. You have steadfastly refused to negotiate in what we consider to be good faith.

Cherry and Naeyaert admit that they did not follow the procedures in the FmHA debarment and suspension regulations[1] in

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[1] The general regulations in effect at that time appear at 7 C.F.R. Ch. XVIII, Part 1980, Subpart A, §§ 1980.1-1980.100 (continued...)

taking the action embodied in the June 1, 1988 letter.

On July 11, 1988, Glenn Walden, then Acting Director of the Florida FmHA, signed a letter drafted by Naeyaert to the Bank, referring to an earlier settlement offer on the Ferris cow proceeds dispute, and stating in part:

> I am confident that when you consider the alternatives, you will agree to a settlement more in line with what we are able to accept so we may discontinue the proposed litigation and resume normal relations between the bank and FmHA.

On September 9, 1988, a law suit was

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[1](...continued)
(1988). The regulations specifically governing debarment and suspension of "eligible lenders" and others appear at 7 C.F.R. Ch. XVIII, Part 1924, Subpart E, §§ 1924.201-1924.220 (1988). (The regulations were later amended and published on April 11, 1989, at 54 Fed. Reg. 14333.) Pertinent provisions of the regulations are set forth verbatim at the outset of this petition.

filed by FmHA against BJC in the United States District Court for the Northern District of Florida, Panama City Division (Case No. 88-50117), alleging the Bank converted FmHA funds comprising part of the Ferris proceeds. The suit sought damages including interest.

On February 28, 1989, Naeyaert instructed FmHA Jackson County Supervisor Charles Snell not to approve the Bank's application for a guarantee of a substantial line of credit to Charles M. Patrick, a Jackson County farmer. Naeyaert's letter cited the existence of the law suit between the United States and BJC and the alleged failure of BJC to negotiate in good faith.

On January 24 and March 1, 1989, Cherry approved annual renewals of loan guarantees originally made for three-year

terms, each of which had been entered into prior to June 1, 1988. In each case, Cherry stated that the renewal of the guarantee was an exception to the policy of not doing business with the Bank and that that policy remained in effect.

On May 5, 1989, Thomas W. Wilder, President of BJC, talked in person with L. James Cherry about the Ferris cow litigation, in Marianna, Florida. Wilder pointed out that Cherry's action had resulted in effective debarment of the Bank from participation in the guaranteed loan program without the benefit of the requirements of FmHA's own regulations. Cherry responded that, as soon as the case which FmHA had filed against the Bank was settled, the Bank would be reinstated to participation in

the guaranteed loan program.

Already, on account of the debarment, the Bank had lost at least two identifiable loans in the Miller and Patrick transactions, from which it would have realized approximately $250,000.00, because it was unable to command FmHA loan guarantees.

On April 16, 1990, the U.S. District Court rendered judgment in accounting in U.S. v. Bank of Jackson County. The Court found that FmHA had voluntarily withdrawn its conversion claim against the bank. No interest was sought at trial and none was awarded by the Court. The judgment for amounts allotted to FmHA was satisfied by payment tendered twelve days after the judgment was rendered. On May 22, 1990, both Cherry and Naeyaert stated at deposition that their

prohibition against BJC doing business with the FmHA remained in effect, notwithstanding the termination of the litigation and satisfaction of the judgment.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This action was commenced on May 16, 1989, with the filing of a complaint for damages and for declaratory and injunctive relief to redress violations of the Bank's First and Fifth Amendment rights due to its debarment, without due process of law, from the Florida FmHA's loan guarantee program. The damages portion of the suit was brought against the Florida state director of FmHA and his chief of farmer programs, individually, under ***Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics***, 403 U.S. 388, 91 S.Ct. 1999,

29 L.Ed.2d 619 (1971).

The defendants moved to dismiss or in the alternative for summary judgment, claiming, inter alia, qualified immunity. The court, Hon. Roger Vinson, J., granted the motion in part as to the Bank's First Amendment claim and denied it as to procedural due process. Order dated March 20, 1990. [A-77]

On July 19, 1990, the Defendants' renewed motion to dismiss and for summary judgment was deemed filed, and on July 23, 1990, the Bank filed its motions for partial summary judgment on the issue of permanent injunctive relief and for partial summary judgment on the issue of damages liability on the due process claims.

On May 13, 1991, the court rendered its Order granting the Bank's motion for

summary judgment on its claim for injunctive relief and ordered the Defendants in their official capacities to reinstate the Bank as a viable participant in FmHA programs. [A-25] In addition, the court granted the Defendants' motion for summary judgment on the individual damages claims. *Id.* The court held that the Bank had no constitutional right to due process, that the Defendants' violation of their own regulations requiring due process was not actionable for damages, and that, in the alternative, the individual Defendants were qualifiedly immune because the rights at issue were not clearly established. Judgment accordingly was entered on May 14, 1991.

An appeal was filed on June 11, 1991. On July 27, 1992, a panel of the

United States Court of Appeals for the Eleventh Circuit issued its opinion affirming, 2-1, the finding of qualified immunity.[2] ***Bank of Jackson County v. Cherry***, 980 F.2d 1354 (11th Cir. 1992) (originally 966 F.2d 1406).

On petition for rehearing, the same panel adhered to its earlier decision, amplifying its reasoning somewhat. ***Bank of Jackson County v. Cherry***, 980 F.2d 1362 (11th Cir., January 11, 1993).

Of this judgment the Bank here seeks review.

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[2] Cherry and Naeyaert did not appeal the district court's grant of injunctive relief requiring the reinstatement of the Bank as a "viable participant" in the Florida FmHA's guaranteed loan program.

BASIS FOR FEDERAL JURISDICTION BELOW

Jurisdiction in the district court was premised on 28 U.S.C. §§ 1331, 2201 and 2202, 42 U.S.C. § 2412 (Equal Access to Justice Act), and the doctrine enunciated in ***Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics***, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Jurisdiction in the court of appeals was premised on 28 U.S.C. § 1291, an appeal as of right from a final order and judgment that disposed of all claims with respect to all parties. The appeal was timely taken, final judgment having been entered on May 14, 1991, and the notice of appeal having been filed on June 11, 1991.

ARGUMENT

POINT I: The First Amendment Right To Petition The Government For Redress Of Grievances Clearly Forbids Officials Of The Farmers Home Administration (FmHA) From Debarring The Bank Without Due Process Of Law From Participating In FmHA Loan Guarantee Programs, When The Purpose Of The Debarment Is To Force The Bank To Abandon Or Compromise Its Position In A Civil Dispute With The FmHA

The Bank was indefinitely debarred in an attempt by Cherry and Naeyaert to force it to come to heel in a longstanding dispute over the Ferris cow proceeds. The purpose was to prevent or interfere with the Bank's exercise of its First Amendment rights, among which is the right of access to the courts. ***NAACP v. Button***, 371 U.S. 415 (1963); ***UMW v. Illinois State Bar Ass'n***, 389 U.S. 217 (1967); ***Haynesworth v. Miller***, 820 F.2d

1245 (D.C. Cir. 1987).[3]

For example, the Walden letter of July 11, 1988, drafted by Naeyaert, is unmistakable in its coercive import:

> I am confident that when you consider the alternatives, you will agree to a settlement more in line with what we are able to accept so we may discontinue the proposed litigation and resume normal relations between the bank and FmHA.

Even more compelling is the testimony of Bank President Wilder that, in a May 1989 conversation with Cherry, he pointed out that the FmHA had debarred the Bank without a hearing as required by FmHA regulations. Cherry's response was that, as soon as the Ferris cow case was "settled," the Bank would be "reinstated"

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[3] The right to petition for redress of grievances is generally subject to the same constitutional analysis as the Free Speech Clause. ***Wayte v. United States***, 470 U.S. 598, 610 n.11 (1985).

as a participant in the federally guaranteed loan program. Wilder affidavit, July 10, 1989, ¶ 24. [A-113-114]

The Eleventh Circuit agreed that the defendants used the debarment "as a lever to coerce favorable settlement of the Ferris cow dispute," a tactic which "has no place in government." 980 F.2d at 1369. Yet the court did not reach the question whether the government's use of debarment to coerce the favorable settlement of a civil dispute unconstitutionally infringes upon a civil litigant's First Amendment rights, because it held that those rights were not clearly established. *Id.* at 1371.

The court's decision conflicts with established law in several circuits, which it tries, unconvincingly, to

distinguish. The District of Columbia Circuit has squarely held that "retaliatory prosecution constitutes an actionable First Amendment wrong redressable under ***Bivens*** . . . ." ***Haynesworth v. Miller***, ***supra***, 820 F.2d at 1255. There, the Court upheld a claim against D.C. police, officials and the municipality that an unmerited prosecution had been undertaken in retaliation for Haynesworth's refusal to surrender his right to challenge official misconduct in court. Several other circuits have reached the same conclusion.[4]

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[4] ***See e.g.***, ***Sexton v. Ryan***, 804 F.2d 26 (2d Cir. 1986); ***Boyd v. Adams***, 518 F.2d 83 (7th Cir. 1975); ***MacDonald v. Musick***, 425 F.2d 373 (9th Cir.), ***cert. denied***, 400 U.S. 852 (1970); ***Lusby v. T.G.& Y. Stores, Inc.***, 749 F.2d 1423 (10th Cir. 1984), ***vacated for reconsideration***, ---U.S.---, 106 S.Ct. 40 (1985).

(continued...)

The court below attempted to distinguish the retaliatory prosecution cases on two grounds. First, the cases involve criminal prosecution, which "triggers an array of constitutional, historical, and statutory considerations" inapplicable here. 980 F.2d at 1370. Reasonable officials, the court reasoned, could not have seen the similarity between the "loss of freedom" and "lasting stigma" associated with criminal prosecution and the consequences of debarment. *Id.*

Petitioner contends the similarity

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[4](...continued)
Town of Newton v. Rumery, ---U.S.---, 107 S.Ct. 1187 (1987), is not to the contrary. ***Rumery*** simply held that the mere possibility of over-reaching should not invalidate an agreement not to sue where the evidence showed that the agreement was entered into voluntarily, and that the prosecutor acted reasonably and pursued legitimate law enforcement goals.

is striking. In the progenitor of a long line of debarment cases, ***Gonzalez v. Freeman***, 334 F.2d 570 (D.C. Cir. 1964), then circuit judge (later Chief Justice) Burger pointed out that debarment is a penalty that "can carry with it grave economic consequences." 334 F.2d at 574.[5] Moreover, the FmHA's own regulations speak directly to the point:

> Debarment and suspension are drastic actions which may severely affect the economic well-being of the persons debarred or suspended. . . .

7 C.F.R. § 1924.213(a). On the question of harm, the criminal/civil distinction is an abstraction, itself unlikely to occur to officials bent on penalizing the

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[5] In the present case, of course, the grave economic detriment of debarment is documented in the affidavit of Thomas W. Wilder, July 10, 1989, ¶¶ 18-23. [A-109-113] The aspects of the harm suffered by the Bank are the same as the factors listed in ***Gonzalez***, 334 F.2d at 574.

exercise of constitutional rights to gain their ends.

Actually, the criminal/civil distinction makes the present case more compelling than the retaliatory prosecution cases. There, the weighty governmental interest in unfettered prosecutorial discretion[6] must be considered against the claim that an individual's access to courts is being held hostage to official action. Here, there is no countervailing interest at all. The defendants have no discretion to violate their own regulations and make ad hoc debarment decisions. They have no power to debar without due process. Certainly they cannot claim the power to

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[6] See the discussion of factors counseling judicial reluctance to interfere with prosecutorial discretion in ***Wayte v. United States***, ***supra***, 470 U.S. at 607-608.

do both of these things for the purpose of punishing or preventing the exercise of First Amendment rights.

However, the court below found a second basis for distinguishing the retaliatory prosecution cases in the "many legitimate objectives" of the officials' "pursuit of settlement". 980 F.2d at 1370. The distinction fails. There is a similar benefit to the public fisc if lawsuits against the police are deterred, yet retaliatory prosecution and coerced waiver of claims are not permitted on that account. As the Seventh Circuit pointed out in ***Matzker v. Herr***, 748 F.2d 1142, 1150 (7th Cir. 1984):

> [a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable . . . even if the act, when taken for a different reason, would have

been proper.

See also, ***Norwell v. City of Cincinnati***, 414 U.S. 14 (1973); ***DeLoach v. Bevers***, 922 F.2d 620 (10th Cir. 1990); ***Losch v. Borough of Parkesburg***, 736 F.2d 903 (3d Cir. 1984).

The court also attempted to distinguish precedent that did not involve criminal prosecution. In ***Matzker v. Herr***, 748 F.2d 1142 (7th Cir. 1984), a prisoner complained to a judge about being held in segregation. In retaliation, the prisoner claimed, a jail official refused to transfer him to a safer cellblock. The Seventh Circuit held that this stated a claim for damages against the official. ***See also Milhouse v. Carlson***, 652 F.2d 371 (3d Cir. 1981); ***McDonald v. Hall***, 610 F.2d 16 (1st Cir. 1979). In a footnote, the court below

distinguished ***Matzker*** for the same reasons as the retaliatory prosecution cases, 980 F.2d at 1370-1371, although ***Matzker*** did not involve criminal prosecution.

Ultimately, the Eleventh Circuit's attempts to show that the present case is not similar enough to established precedent conflict with its own round condemnation of the officials' conduct. If that conduct has no place in government, surely it is because it violates clearly established rights of which reasonable officials have no cause to be uncertain. Unpunished access to court as an aspect of the First Amendment is neither novel nor vexed. Where the court goes astray is in its emphasis on the criminal/civil dichotomy. It is clearly established that it is improper

to ***penalize*** the exercise of First Amendment rights; it does not matter whether that penalty takes the form of "criminal" or "civil" sanction, as long as the sanction is not ***de minimis***. Nor does it matter whether the precise form of penalty fashioned by the imagination of overreaching officials has occurred in the past. The only thing that matters for purposes of qualified immunity analysis is that the wrongfulness of the official action be obvious:

> This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Least persuasively of all, the Eleventh Circuit held that the connection

between the debarment and the Bank's First Amendment rights was too attenuated to overcome official immunity. The court emphasized the fact that the debarment did not in fact dissuade the Bank from defending its position in the Ferris cow litigation.

This misses the point entirely. Effective redress for the violation of rights must not depend upon acquiescing in their destruction. The First Amendment is violated not merely when its exercise is prevented or restricted, but also when a penalty is paid for its exercise. In ***Matzker***, the penalty was the refusal of jail officials to order a transfer to a safer cellblock. Here, the penalty was the debarment. The Bank's right to sue for damages does not depend upon its actually having submitted to the

official lawlessness any more than Matzker's did.

POINT II: The Debarment Of The Bank Without Due Process Of Law From Further Participation In FmHA Loan Guarantee Programs, Coupled With Allegations Of Dishonest Or Fraudulent Conduct, Infringes A Clearly Established, Protected Liberty Interest

The court below parted company with the other circuits in failing to find the denial of a clearly established liberty interest. At least since ***Old Dominion Dairy Products, Inc. v. Secretary of Defense***, 631 F.2d 953 (D.C. Cir. 1980), it has been widely understood that the debarment of a government contractor, when it occurs under a cloud of alleged dishonest or fraudulent conduct, implicates a liberty interest that is entitled to due process protection.

Here, the Bank was charged, by the heads of the Florida FmHA, with a lack of integrity for failing to deal in good faith with the government in the Ferris cow dispute. This stigma was accompanied by a loss of business opportunity, namely, the refusal to entertain the Bank's future applications for FmHA loan guarantees. At least two identifiable loans were lost, from which the Bank would have realized more than $250,000. *See* Affidavit of Wilder, July 10, 1989, ¶ 20. [A-111-112][7]

The case is indistinguishable in this respect from ***Old Dominion***, ***supra***.

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[7] As already pointed out, the Bank had participated as an eligible lender in FmHA programs since 1980. Affidavit of Wilder, July 10, 1989, ¶ 4. [A-98] From 1984 through June 1988, the FmHA had guaranteed Bank loans and lines of credit totalling $1,065,990.95. *Id.* ¶ 18. [A-109-110]

There, a contractor was not told, before two "non-responsibility" *determinations*, that it was under investigation, and was told only afterward that the determinations were based on the lack of a "satisfactory record of integrity."[8] Citing ***Board of Regents v. Roth***, 408 U.S. 564 (1972), and ***Paul v. Davis***, 424 U.S. 693 (1976), the Court held

> it is precisely the "accompanying loss of government employment" and the "foreclosure from other employment opportunity" which is the injury resulting from the Government defamation complained of in this case. As a result, we hold that a liberty interest recognized by the Fifth Amendment is implicated in this case.

631 F.2d at 966.

Since ***Old Dominion***, numerous other

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[8] ***Old Dominion*** did not involve the blanket proscription of future dealings that we have here.

cases have affirmed the liberty interest analysis. *See, e.g., Transco Securities, Inc. v. Freeman*, 639 F.2d 318 (6th Cir.), *cert. denied* 454 U.S. 820 (1981); ***ATL, Inc. v. United States***, 736 F.2d 677 (Fed. Cir. 1984); ***Mainelli v. United States***, 611 F. Supp. 606 (D.R.I. 1985); ***Shermco Industries, Inc. v. Secretary of the Air Force***, 584 F. Supp. 76 (N.D. Tex. 1984); ***Green v. Brantley***, 719 F. Supp. 1570 (N.D. Ga. 1989); ***Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers***, 534 F.Supp. 1139 (D.D.C. 1982); ***Arrow Air, Inc. v. United States***, 649 F. Supp. 993 (D.D.C. 1986); ***Bartel v. Federal Aviation Administration***, 725 F.2d 1403 (D.C. Cir. 1984); ***Conset Corporation v. Community Services Administration***, 655 F.2d 1291

(D.C. Cir. 1981).[9]

Admitting that "the question is a close one," the court nonetheless distinguished this case on two grounds: viz., the stigmatizing allegation was neither sufficiently publicized nor sufficiently injurious to deprive the Bank of its liberty. 980 F.2d at 1367.

As to publication, the Court noted that the allegation was circulated by the defendants only within FmHA and to its

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[9] *See generally*, Comment, "Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors," 36 Am. U. L. Rev. 693 (1987); Note, "Government Contracts - Nonresponsibility Determinations - The Federal Government Violates a Contractor's Due Process Liberty Interest by Failing to Provide Prior Notice and an Opportunity to Rebut Charges Contained in Nonresponsibility Determinations Based on Lack of Integrity; Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980)," 50 Geo. Wash. L. Rev. 90 (1981).

lawyers. Although the Bank was obliged to tell its borrowers of its inability to participate in the FmHA guaranteed loan program, the Court rejected this potentially limitless (for who knows how many persons the borrowers told?) "outside" publication because the Bank cannot say how many potential customers it lost, nor did the defendants require the Bank to disclose the reason for the debarment.

More publication than this is not required by the seminal debarment case, ***Old Dominion***. There, distinguishing one of the cases relied upon by the court here, the D.C. Circuit stated:

> Although the Government has never attempted to suggest otherwise, we note that there is no problem of a lack of publication of the damaging characterization as was present in ***Bishop v. Wood***, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d

> 684 (1976). In the present case, ***the determination that Old Dominion lacked integrity had already been communicated through Government channels and would undoubtedly have been recommunicated every time ODDPI bid on a subsequent contract.***

631 F.2d at 966 n.24. This is precisely the kind of "in-house" but nonetheless devastating scope of publication present here.

Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978), an opinion relied upon by the ***Old Dominion*** court, dealt similarly with the publication issue. The case concerned only intra-agency publication:

> The Commission points out that its findings will not be made public and are made available to the various agencies only on a need to know basis. However, the federal government is composed of many different agencies and departments, all of which could obtain the information under various circumstances. ***In effect, Larry has been stigmatized throughout the entire federal***

> *government*. He is deprived of the opportunity to work in any capacity for any branch of the government.

Larry v. Lawler, 605 F.2d 954, 958 (7th Cir. 1978) (emphasis added). *See also Doe v. United States Department of Justice*, 753 F.2d 1092, 1113 n.24 (D.C. Cir. 1985).

Nor is it enough to say that the Bank failed to identify the customers it lost. We deal here, after all, with that part of the liberty interest injury which mimics defamation. It is a familiar characteristic of per se defamation (as surely this was) that general damages are presumed, since the law has long understood that among the pernicious effects of this tort is the fact that those who are influenced by the slander to the victim's detriment seldom stand up to be counted.

More importantly, the Bank has no way of knowing how many customers it lost because they were not referred to the Bank by FmHA.

It is not significant that the Bank was not required to tell its customers the reason for the debarment. Even if the Bank did not owe a (foreseeable) fiduciary duty to disclose the allegation to its farm borrowers, good sense dictated that it do so. The unspecified slur often does more injury than the details. Telling its borrowers that the Government claimed to think the Bank was crooked, and why, was probably the Bank's only method of ***minimizing*** the damage, since at least some of the farmers, trusting their bankers, might have been expected to believe them.

On the question of injuriousness,

the court minimized the Bank's showing and exaggerated the relative injury in other debarment cases. The court stated that FmHA continued to guaranty the Bank's loan renewals in Florida, that it guaranteed all of the Bank's Alabama loans, and that the Bank remained free "to do business with any of the numerous federal agencies that deal with banks."

The facts are less sanguine. FmHA chose to renew only *two* loans when they came due---and in each case the defendants took pains to emphasize that this was an exception to the policy of no business, and did not mean that any further loan renewal would be granted.[10] There was no evidence that

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[10] Moreover, this was not *new* business. In each case, the loans had been made *before* the debarment for a three-year term, and the contract simply called for yearly renewal upon review of (continued...)

the Florida bank did a substantial amount of business with Alabama farmers.

As for the Bank's "freedom" to deal with other government agencies, it is an illusion. Unlike many other government contractors, banks are primarily local entities, dealing with borrowers from the local community. Obviously the Bank could not service loans elsewhere in the country, nor could it qualify (debarment aside) under the FmHA's regulations as an "eligible lender" in far-flung places. Banks are service institutions. They are not purveyors of goods to multiple government agencies. Being blacklisted by the Department of Defense, or the General Services Administration, for example, would have had no effect on the Bank. Short of attempting to extend the

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[10](...continued)
the borrower's operation.

blacklist to Alabama FmHA, with whom the Bank did some business, Cherry and Naeyaert did all the harm they could do. That they did not place the Bank's name on a government-wide or nationwide debarment list hardly mitigates the damage.

The effect on the Bank of being totally cut off from Florida farm loan guarantees must be gauged against the fact that this is a small bank in rural northwest Florida. Twenty to twenty-five percent of its outstanding loans were agricultural. The Bank had participated as an eligible lender in FmHA programs since 1980. From 1984 through June 1988, the FmHA had guaranteed Bank loans and lines of credit totalling $1,065,990.95. Although, as already pointed out, it is inherently problematic to identify

specific business losses in the debarment situation, the Bank was able to identify at least two loans lost in the debarment, from which it would have realized more than $250,000. Affidavit of Wilder, July 10, 1989, ¶¶ 4, 18, 20. [A-98, 109-110, 111-112] On summary judgment, all of this went completely unrebutted by the defendants.

The court appeared to make out an insubstantiality determination only in relative terms, by comparing the Bank's losses with the "scorched earth" of ***Old Dominion*** and other cases. But as Judge Godbold pointed out in his dissent from the original panel opinion, nothing in those cases required total destruction as a matter of law. 980 F.2d at 1362.

Even the perception of ***Old Dominion, ATL, Ind. v. United States***, 736 F.2d 677

(Fed. Cir. 1984), and ***Transco Sec., Inc. v. Freeman***, 639 F.2d 318 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981), as "total destruction" cases is problematic. ***ATL*** was a suspension case, not a debarment. While it is true that the construction contractor there was "a small business concern whose work is done almost entirely with the Federal Government," no attempt was made to show that ATL was not free to engage itself elsewhere. As the court noted:

> ATL is still theoretically free, in the face of the 12- or 18-month suspension, to pursue non-government contract work. A small business choosing to put nearly all its eggs in one Government contracts basket must be expected to bear some responsibility for the risk that that basket could, as a result of the contractor's misconduct, temporarily or even permanently be snatched away -- with the required procedural safeguards here at issue.

736 F.2d at n.31. The Bank here, of course, and its farm borrowers, were not free even theoretically to obtain similar loan guaranties elsewhere.

Similarly, ***Transco*** was a suspension case, involving a potential maximum of 18 months before a hearing was required under the regulations there at issue. The contractor was in the business of providing security services, and the opinion does not state that no private market existed.

Old Dominion itself involved not even suspension but nonresponsibility determinations as to two contracts. The contractor was a small business choosing to supply dairy products almost exclusively to the military. No one would suggest that other markets for milk were unavailable.

It may be possible to demonstrate that the injuries in the above cases were greater than BJC's loss in both absolute dollars and as a proportion of business. However, none of those cases involved a debarment of indefinite duration and none involved debarment from participation in an absolutely unique "market" for federally-guaranteed loans, guaranties which the Bank and its farm borrowers were not free to seek elsewhere.

Finally, it is significant to note that, in its more recent opinions, the D.C. Circuit has demonstrated that it does not read ***Old Dominion*** as imposing so high a level of injury. In ***Mosrie v. Barry***, 718 F.2d 1151, 1161, 1162 (D.C. Cir. 1983), the court said:

> . . . [T]he principal recent cases from this court in which a government-imposed stigma was found to have deprived the

> stigmatized person of a liberty interest involved either loss of employment or foreclosure of a right to be considered for government contracts in common with all other persons.
>
> * * *
>
> An actual loss of employment *or change in legal status [is] sufficient to qualify as a deprivation of liberty* when accompanied by stigmatizing remarks.

And in *Doe v. United States Department of Justice*, 753 F.2d 1092 (D.C. Cir. 1985), a case involving the discharge under stigmatizing allegations of a DOJ attorney, the essential requirements of *Paul*'s "stigma plus" test were stated as follows:

> First, the government must be the source of the defamatory allegations. Second, the resulting "stigma" must involve *some tangible change of status vis-a-vis the government*.

753 F.2d at 1108-1109 (citation omitted) (emphasis added).

Under any reasonable standard, the

nature of the Bank's injury implicated a protected liberty interest, just as in the many other debarment cases. The court's subjection of that injury to an unarticulated ***magnitude*** analysis was error. It sends the unfortunate message to officials that violation of clearly established rights will not pierce damages immunity unless the destruction is total, or nearly so. To plaintiffs it may mean that, if official lawlessness has left them enough resources to mount litigation, then that litigation will be fruitless.

POINT III: The Bank's Right To Compete On An Equal Footing With Others For FmHA Loan Guarantees Is A Clearly Established Property Interest Which Cannot Be Extinguished Without Due Process Of Law

The court below gave short shrift to

the argument that debarment infringes a property interest. It pointed out that the Bank has no right to obtain FmHA loan guaranties, and that it therefore has no property interest in them.

However, the Bank never claimed a "right" to any government contract. It did not complain of any particular administrative decision rejecting a given loan application. It objected to summary debarment, or blacklisting, from all further relationships, from eligibility for consideration on a case-by-case basis. All the Bank, or any government contractor, is entitled to is a decision-making process which makes it reasonably probable that approval or rejection will be based on the merits. That is what due process is. The history of the Bank's dealings with the FmHA demonstrates quite

clearly, if demonstration were necessary,[11] that when the FmHA made its decisions on the merits (prior to the debarment), the Bank reaped substantial economic benefits. To no longer have access to a process in which decisions are probably made on the merits---which is what debarment or any other blacklisting means---is to suffer economic detriment.

The leading case, ***Gonzalez v. Freeman***, 334 F.2d 570 (D.C. Cir. 1964), recognizes the distinction between the right to a contract and the right to eligibility.

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[11] According to *Gonzalez'* wise counsel, of course, demonstration is *not* necessary. *See* 334 F.2d at 574; *see also* the Defendants' own regulations: "Debarment and suspension are drastic actions which may ***severely affect the economic well-being*** of the persons debarred or suspended." 7 C.F.R. § 1924.213(a) (emphasis added).

> It is . . . correct, broadly speaking, to say that no citizen has a "right," in the sense of a legal right, to do business with the government. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940). But use of such terms as "right" or "privilege" tends to confuse the issues presented by debarment action. ***Interruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts and can carry with it grave economic consequences.***

334 F.2d at 574 (emphasis added). The court concluded that contractors "have a right not to be debarred except in an authorized and procedurally fair manner . . ." *Id.* at 576.

Both the D.C. Circuit and the Second Circuit have suggested that debarment implicates a protected property interest. In ***Art Metal-U.S.A., Inc. v. United States***, 753 F.2d 1151 (D.C. Cir. 1985), a

contractor brought suit under the Federal Tort Claims Act [FTCA], 28 U.S.C. §§ 1346(b), 2671-2680 (1982), seeking damages for its unlawful de facto debarment from government contracting. Although the Court rejected the FTCA action, it intimated that an action for constitutional tort (such as the present action) might have fared differently:

> An examination of the regulations indicates that they essentially impose duties on GSA officials to deal fairly with government contractors. Moreover, the "fairness duties" are required of the government as a government under the due process clause of the United States Constitution, ***See Gonzalez v. Freeman***, 334 F.2d 570 (D.C. Cir. 1964). As Art Metal itself recognizes, the regulations are "designed to protect contractors' due process rights, liberty interests, and ***economic interests*** from an arbitrary, capricious, unfair, or incorrect debarment." Brief for Appellant at 33. These constitutional rights are

> guaranteed under federal law, not local law.

753 F.2d at 1160 (emphasis added). *See also* ***Myers & Myers, Inc. v. United States Postal Service***, 527 F.2d 1252, 1258-59 (2d Cir. 1975):

> Where a federal agency takes action to debar a private firm from further business relations with that agency the effect is far different from that of simply denying an application for a contract. [Quotation from ***Gonzalez v. Freeman***, ***supra***, omitted]. Denial of notice and a hearing before debarment would "give rise to serious constitutional issues," [***Id.***, 334 F.2d 570] at 579 . . . .

The Third Circuit adopted a similar view in the context of a 42 U.S.C. § 1983 action against state officials. *See* ***Berlanti v. Bodman***, 780 F.2d 296 (3d Cir. 1985), where it was held that an individual contractor had a property interest under New Jersey law in not

being debarred from state contract bidding.

The court below correctly pointed out that several post-***Gonzalez*** cases, notably ***ATL, Inc. v. United States***, 736 F.2d 677 (Fed. Cir. 1984), and ***Transco Security, Inc. v. Freeman***, 639 F.2d 318 (6th Cir. 1981), have rejected property interest analysis in debarments. However, in those cases, either the action at issue fell short of the across-the-board, indefinite-term debarment that here occurred, or the conclusion is, we submit, simply wrong. The error stems from the unexamined assumption that disqualification from consideration of all future applications is equivalent to denial of any one particular contract. ***Gonzalez*** should have made it clear that invoking the nostrum that "there is no

right to a government contract" does not end the analysis.

A blacklist is not the same thing as a snub. If the defendant officials had rejected one or two of the Bank's applications for an FmHA loan guarantee, the Bank would not be here. What the defendants did, however, was to notify the Bank that they would no longer ***consider*** the Bank's applications for loan guarantees, period. The right to have those applications considered, for acceptance or rejection, is unquestionably an interest of economic value. That it is an interest protected by the Constitution, an interest that cannot be expropriated without "either regulations establishing standards and a procedure which are both fair and uniform or basically fair treatment" was

established as early as ***Gonzalez***. 334 F.2d at 580.

Here, 25 years after ***Gonzalez***, the FmHA was supposed to be operating under regulations designed to ensure such fair treatment. The regulations, which these officials admittedly ignored, expressly recognize that debarment is a "drastic" action "which may severely affect the economic well-being" of the person debarred. 7 C.F.R. § 1924.213(a). Since the debarment of the Bank had precisely that effect, the officials should not be immune from a suit for damages.

CONCLUSION

The Eleventh Circuit found that the FmHA officials' conduct has "no place in government," and it insisted that

> the message to FmHA officials must be clear: They may not grant or deny the opportunity to participate in FmHA programs without following the agency's regulations.

980 F.2d at 1369. Yet, by denying the Bank a damages remedy, the court unintentionally sends a very different message. It tells the kind of officials whom only *Bivens* could control that they will not be called to personal account for the violation of clearly established rights. To recall that message, for all of the foregoing reasons, the judgment of the Eleventh Circuit Court of Appeals should be reversed.

Dated: April 6, 1993

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari, with separate Appendix, have been furnished to Michael S. Raab, Esq., and Barbara L. Herwig, Esq., Civil Division, Appellate Staff, U.S. Department of Justice, Room 3631, Main Justice Building, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, to Benjamin W. Beard, Esq., Assistant U.S. Attorney, 114 East Gregory Street, Pensacola, FL 32501-4972, and to the Solicitor General, Department of Justice, Washington, D.C. 20530, pursuant to Supreme Court Rule 29, by U.S. Mail, on the 9th day of April, 1993.

JERRY W. GERDE

(2)

Supreme Court, U.S.
FILED
APR 12 1993
OFFICE OF THE CLERK

92-1895
CASE NO.: _____

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

BANK OF JACKSON COUNTY,

Petitioner,

vs.

L. JAMES CHERRY and RAYMOND G. NAEYAERT,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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AFFIDAVIT OF THOMAS WILDER,
July 10, 1989 . . . . . A-170

BANK OF JACKSON COUNTY,

Plaintiff-Appellant,

v.

L. James CHERRY: Raymond G. Naeyaert, Defendants-Appellees.

No. 91-3547.

United States Court of Appeals.

Eleventh Circuit.

Jan. 11, 1993.

Appeal from the United States District Court for the Northern District of Florida.

ON PETITION FOR REHEARING

(Opinion July 27, 1992, 11th Cir. 966 F.2d 1406).

Before HATCHETT and DUBINA.
Circuit Judges, and GODBOLD, Senior
Circuit Judge.

HATCHETT, Circuit Judge:

In this appeal, we affirm the district court's ruling that Farmers Home Administration (FmHA) officials did not deprive a bank of First Amendment, liberty, or property rights when they debarred the bank.

FACTS

The Bank of Jackson County (BJC) is a small bank in northwest Florida. In September, 1981, BJC loaned money to Elmer and Shirley Ferris to purchase forty-six dairy cows. The Farmers Home

Administration, a federal agency, guaranteed the loan. In 1982, when the Ferrises began surreptitiously removing their cattle from Florida, BJC took possession of the cows remaining at the Ferrises' farm. BJC and FmHA sold the cows jointly and put the proceeds into a joint account.

In September, 1984, BJC informed FmHA that it had begun applying funds from the joint account to its debts. FmHA objected, and a dispute followed. In July, 1986, FmHA informed BJC that it would not negotiate further over ownership of the funds until BJC restored the amounts that it had withdrawn from the account.

For nearly two years, FmHA did not

communicate again with BJC regarding the Ferris cow dispute. Then, on April 14, 1988, Raymond G. Naeyaert, Florida chief of FmHA farmer programs, instructed the FmHA supervisor in Holmes County not to issue a conditional commitment for an FmHA guarantee on a BJC loan to a local farmer named Adron Miller. Naeyaert told the supervisor that he was not to conduct any further business with BJC because of the unresolved dispute over the Ferris proceeds.

The same day, an Assistant United States Attorney for the Northern District of Florida, Benjamin Beard, wrote a letter to the General Counsel's Office of the U. S. Department of Agriculture in Atlanta. In relevant part, Beard stated:

[A]s I understand the facts of this case.

[BJC] officials *intentionally and with knowledge misrepresented their actions* in the case and thereafter flatly refused to comply with their represented agreement. At the very least that is *civil fraud* and in my view demonstrates that *the bank officials do not believe that they are required to deal in a forthright and ethical manner with the government.*

> If that is their belief, then I believe it is exceedingly unwise to enter into any financial transaction with them wherein the FmHA would have to rely on these officials to conduct servigin (sic) and to deal honestly with the FmHA....[Emphasis

added.]

On May 5, 1988, Ted Elders, an Agriculture Department attorney, wrote to L. James Cherry, Florida state director of the FmHA, agreeing with Beard's opinion. Elders suggested that Cherry consider withdrawing from pending transactions involving BJC and refuse to undertake any new transactions with the bank.

On June 1, 1988, Cherry wrote to BJC stating that (1) FmHA would not "enter into any loan guaranty submitted by [BJC]"; (2) FmHA would honor existing guaranties; and (3) FmHA was terminating its Treasury Limited Account with BJC on July 1, 1988. The reason for these actions, according to Cherry, was BJC's

refusal to negotiate in "good faith" over the Ferris cow dispute. Cherry and Naeyaert, the appellees, admitted that the purpose of the letter was to discontinue all further dealings with BJC in Florida, except those relating to existing guaranties. FmHA's Alabama office, however, continued to issue guaranties on new BJC loans.

In July, 1988, Glen Walden, the acting Florida director of the FmHA, wrote to BJC rejecting its latest settlement offer in the dispute over the Ferris proceeds. Walden reaffirmed FmHA's earlier settlement offer and encouraged BJC to accept it. In doing so, Walden stated:

I am confident that when you

> consider the alternatives you will agree to a settlement more in line with what we are able to accept so we may discontinue the proposed litigation and resume normal relations between the bank and FmHA.

BJC did not accept FmHA's settlement offer, and on September 9, 1988, FmHA sued BJC over the Ferris proceeds.

FmHA's Florida office continued to refuse to issue new guaranties on BJC loans. In February, 1989, Naeyaert wrote the Jackson County FmHA supervisor, rejecting his request for a guaranty on a BJC loan to Charles M. Patrick, a local farmer. Naeyaert stated that FmHA would not issue new guaranties on BJC loans because of the bank's failure to

negotiate in "good faith" in the Ferris cow dispute. Around this same time, Cherry approved two BJC loan renewals, but reiterated that his office would not issue any new guaranties.

Appellees also continued to use the guaranty program as a lever to force resolution of the Ferris dispute. On May 5, 1989, Cherry met with Thomas W. Wilder, BJC's president, at a "fish fry" for Agriculture Secretary Clayton Yeutter in Marianna, Florida. Wilder stated his belief that FmHA had "debarred" BJC without following the proper procedural requirements for that penalty. Cherry responded that the Florida FmHA office would resume its business relationship with BJC as soon as the Ferris cow litigation was settled.

In April, 1990, the District Court for the Northern District of Florida entered judgment in the Ferris cow litigation, finding BJC entitled to $25,000 and FmHA entitled to $62,000. Although the dispute was thereby resolved, FmHA did not resume its business relationship with BJC.

PROCEDURAL HISTORY

BJC brought this *Bivens* action against Cherry and Naeyaert alleging that termination of the business relationship with FmHA ("debarment") deprived BJC of its constitutional rights. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In particular, the complaint

alleged that termination of the business relationship, without following procedural requirements contained in FmHA regulations, deprived BJC of liberty and property without due process of law. The complaint further alleged that the debarment penalized BJC for exercising its First Amendment right to petition the government for a redress of grievances in the Ferris cow dispute. BJC sought damages against appellees in their individual capacities and injunctive relief in their official capacities.

The district court entered summary judgment for appellees on the damages claims and for BJC on the injunctive claim. The court found that FmHA failed to follow its own debarment regulations, and ordered BJC reinstated "as a viable

participant in the Florida FmHA programs." The court found, however, that the debarment did not deprive BJC of a liberty or property interest. In the alternative, the court held that appellees were immune from suit under the qualified immunity doctrine, because any deprivation did not violate BJC's clearly established constitutional rights. Similarly, the court held that appellees' actions did not violate BJC's clearly established First Amendment rights.

BJC appealed from the district court's entry of summary judgment for appellees on the damages claims. Appellees do not cross-appeal from the injunction ordering BJC reinstated in FmHA lending programs.

CONTENTIONS OF THE PARTIES

BJC contends that appellees deprived it of clearly established liberty and property interests without due process of law when they debarred it without following FmHA's debarment procedures. BJC also contends that the debarment violated its clearly established First Amendment right to petition the government for redress of grievances. Appellees respond that the debarment did not deprive BJC of liberty or property. To the extent that the debarment did work such a deprivation, however, BJC's rights were not clearly established. Thus, appellees are immune from suit under the qualified immunity doctrine. Appellees also contend that the debarment did not violate any of BJC's clearly established

First Amendment rights.

ISSUES

The issues presented are:

(1) Whether the debarment deprived BJC of clearly established liberty or property rights without due process of law; (2) whether the debarment violated BJC's clearly established First Amendment rights.

DISCUSSION

A. Due Process Claim

The government may not deprive any person of "life, liberty or property

without due process of law." U. S. Const. amend. V. BJC argues that it had a property interest in FmHA's loan guaranty program. Moreover, BJC argues that appellees deprived it of liberty when they debarred it from that program on the basis of "stigmatizing" allegations. Because appellees deprived BJC of these constitutionally protected interests without affording it the process due under the Fifth Amendment, BJC argues it is entitled to damages.

To prevail upon its procedural due process claim, BJC must establish: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the

deprivation. *See Lehr v. Robertson*, 463 U.S. 248, 256, 103 S.Ct. 2985, 2990, 77 L.Ed.2d 614 (1983); *Greenholtz v. Inmates of the Nebraska Penal and Correction Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103, 60 L.Ed.2d 668 (1979); *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 2705-06, 33 L.Ed.2d 548 (1972). Failure to establish any one of these elements is fatal to BJC's due process claim.

1. Property Interest

[1] A property interest must rest upon "a legitimate claim of entitlement." *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. Courts have consistently held that "no citizen has a 'right' ....to do business with the government." *Gonzalez v.*

Freeman, 332 F.2d 570, 574 (D.C.Cir.1964); *see also Sutton v. U.S. Dept. of Housing and Urban Development*, 885 F.2d 471, 474 (8th Cir.1989) (individual had no constitutionally protected property interest in membership on panel of government approved property appraisers); *ATL, Inc. v. United States*, 736 F.2d 677, 683 (Fed.Cir. 1984) (suspended contractor has no property interest in government contracts); *Transco Security, Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir.1981) (right to bid on government contracts is not a property interest). BJC points to no "independent source" of law securing to it the right to participate in FmHA's loan guaranty program. *See Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. While BJC surely attaches great importance to FmHA

loan guaranties, our analysis must focus not upon the weight of BJC's interest, but upon the "nature" of that interest. *Roth*, 408 U.S. at 570-71, 92 S.Ct. at 2705-06. Simply put, federal law does not create an entitlement to FmHA loan guaranties. Thus, the "nature" of BJC's interest in such guaranties is "an abstract need or desire" to obtain them. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. Because BJC is not entitled to FmHA loan guaranties, it has no property interest in them.

BJC relies heavily upon *Gonzalez v. Freeman* to support the property right it asserts in this case. But *Freeman* held no more than that debarment works a sufficient economic injury on the plaintiff to confer standing. 334 F.2d

at 574-75. It did not hold that the plaintiffs in that case had a property interest in doing business with the government. Indeed, the court explicitly recognized that contractors have no such right. 334 F.2d at 574. The holding in *Freeman* that debarment works a sufficient economic injury to confer standing is insufficient to overcome the weight of more recent cases, holding uniformly that suspended or debarred contractors have no property interest in doing business with the government. *See Sutton*, 885 F.2d at 474; *ATL*, 736 F.2d at 683, *Transco*, 639 F.2d at 321.

2. Liberty Interest

[2] Liberty interests are both broader and more difficult to define than

property interests. While property exists in concrete entitlements secured by independent sources of law, liberty interests cannot be so easily characterized. As the Supreme Court stated nearly seventy years ago:

> [Liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Roth*, 408 U.S. at 572, 92 S.Ct. at 2707. This broad conception of liberty encompasses a person's interest in his or her reputation, coupled with the more tangible benefits or entitlements which rest upon a person's good name. *See Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976).

The Supreme Court defined this liberty interest in reputation in a series of cases decided in the 1970s. In *Roth*, the Court held that a state university's refusal to renew the contract of a nontenured professor did

not deprive the professor of a liberty interest, because the state made no charges against the professor "that might seriously damage his standing and associations in his community." 408 U.S. at 573, 92 S.Ct. at 2707. The state did not impose upon the plaintiff "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. at 573, 92 S.Ct. at 2707. In *Paul*, the Court addressed the reverse situation. There, the Court held that the states's widespread defamation of the plaintiff did not deprive him of liberty, because the damage to reputation was not accompanied by any tangible loss. 424 U.S. at 701, 96 S.Ct. at 1160. Finally, in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), the Court

held that termination of a police officer for alleged misconduct did not infringe upon the officer's liberty, because the city did not publicly disclose the allegations of misconduct. 426 U.S. at 348, 96 S.Ct. at 2079.

Thus, to prevail on a claim that government action deprived the plaintiff of a liberty interest in reputation, the plaintiff must show: (1) a stigmatizing allegation, *Roth*, 408 U.S. at 573, 92 S.Ct. at 2707; (2) dissemination or publication of that allegation, *Bishop*, 426 U.S. at 348, 96 S.Ct. at 2079; *Roth*, 408 U.S. at 573-74, 92 S.Ct. at 2707; and (3) loss of some tangible interest due to publication of the stigmatizing allegation. *Paul*, 424 U.S. at 701, 96 S.Ct. at 1160; *Roth*, 408 U.S. at 573-74,

92 S.Ct. at 2707. *See also Larry v. Lawler*, 605 F.2d 954, 957 (7th Cir. 1978) (summarizing the Supreme Court's liberty interest doctrine).

Federal circuit courts of appeal have applied this line of cases to hold that suspension or debarment of a government contractor on the basis of stigmatizing allegations deprives the contractor of liberty under the due process clause. See *ATL, Inc. v. United States*, 736 F.2d 677, 683 (Fed.Cir.1984); *Transco Security, Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir.1981); *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 966 (D.C.Cir.1980). BJC argues that its debarment from the Florida FmHA loan guaranty program constituted the "tangible loss" required

by *Paul*, and that FmHA's accusations of bad faith constituted the stigmatizing allegations required by *Roth*.

Although the question is a close one, we hold that appellees' actions in this case did not deprive BJC of any constitutionally protected liberty interest. Assuming for purposes of this discussion that FmHA's accusation of bad faith constituted a stigmatizing allegation, that allegation was neither sufficiently publicized, nor sufficiently injurious, to deprive BJC of liberty under the Due Process Clause.

A stigmatizing allegation does not implicate liberty interests unless it is publicized. See *Bishop*, 426 U.S. at 348, 96 S.Ct. at 2079; *Roth*, 408 U.S. at 573-

74, 92 S.Ct. at 2707; *Sutton*, 885 F.2d at 475. In the instant case, FmHA communicated its accusations of BJC's bad faith only to BJC itself and to two FMHA county supervisors in Florida. In addition, appellees communicated the facts of the Ferris cow dispute to an assistant U.S. attorney for the Northern District of Florida and to Department of Agriculture lawyers. As in *Bishop* and *Sutton*, where the courts found no deprivation of liberty, appellees did not disclose any negative information about BJC to the public. And, although appellees discussed BJC's case with government lawyers, they did not communicate the allegations of BJC's misconduct to any other government agency.

BJC argues that the scope of publication was sufficiently broad to impose a tangible injury. BJC's president stated in an affidavit that he "felt obliged" to disclose to potential qualified borrowers that BJC was ineligible for FmHA loan guaranties. In addition, communication of the bad faith charges to FMHA's county supervisors ensured that BJC would receive no new loan guaranties in Florida. According to BJC, the allegation of bad faith, coupled with the tangible loss of the opportunity to participate in FmHA's Florida loan program, was sufficient to deprive it of liberty under the Due Process Clause.

We disagree. All of the cases upon which BJC relies involved a much broader injury to the contractor than BJC

suffered in this case. In *Old Dominion*, the court found that the contractor relied upon the Department of Defense for nearly "100 percent" of its business; that suspension "effectively put Old Dominion out of business"; and that "the government action in this case effectively foreclosed Old Dominion's freedom to take advantage of other government employment opportunities and barred [it] from all public employment." 631 F.2d at 956, 963-64. In *Transco*, the defendant official suspended Transco from bidding on all General Services Administration contracts. 369 F.2d at 320. Finally, in *ATL, Inc.*, the court found that ATL's "work is done almost entirely with the federal government," and that the Navy's suspension prevented it "from further contracting with any

federal government agency." 736 F.2d at 679-80.

The injury to BJC pales in comparison to the injuries found in the above-cited cases. BJC's president testified that "twenty to twenty-five percent" of BJC's outstanding loans were "made for agricultural purposes." Even if all of those loans involved FmHA guaranties, a fact not borne out by the record, BJC would not be as dependent upon the foreclosed government program as were the plaintiff contractors in *ATL*, *Transco*, and *Old Dominion*. Appellees' debarment of BJC from Florida FmHA loan programs had only a limited impact on BJC. FmHA continued to guaranty BJC's loan renewals in Florida, and it continued to guaranty all of BJC's loans

in Alabama. BJC introduced no evidence that appellees' actions affected its dealings with any other government agency besides the Florida FmHA office.

The affidavit of BJC's president stating that he "felt obliged" to disclose BJC's debarment does not compensate for the deficiencies in BJC's case. The bare statement of the affidavit does not tell us how many potential customers the bank lost because of these disclosures. In addition, the government imposed no duty upon BJC to disclose the *reason* for its debarment. Without disclosure of the stigmatizing allegation, the mere loss of BJC's government benefit did not infringe upon its liberty interests. *Bishop*, 426 U.S. at 348, 96 S.Ct. at 2079; *Roth*, 408 U.S.

at 573-74, 92 S.Ct. at 2707.

These distinctions from prior cases amount to an important difference. Simply put, appellees' actions in this case did not deprive BJC of its constitutionally protected liberty. BJC remained free to obtain FmHA guaranties for loan renewals in Florida, and for all loans in Alabama. It remained free to do business with any of the numerous federal agencies that deal with banks. And finally, BJC remained fully free to conduct the seventy-five to eighty percent of its business that was unrelated to agriculture.

The loss of one particular kind of government loan guaranty in a limited geographical area, constituting a limited

portion of BJC's business, did not impose so severe a constraint on the bank's freedom that it may be called a deprivation of liberty. *See Roth*, 408 U.S. at 573-74, 92 S.Ct. at 2707; *Sutton*, 885 F.2d at 475. If BJC were as dependent upon new FmHA loan guaranties in Florida as the suspended and debarred plaintiffs were on government contracts in *ATL*, *Transco*, and *Old Dominion*, this case might have a different outcome. On these facts, however, we cannot conclude that appellees' actions deprived BJC of liberty.

[3] Although we hold that BJC is not entitled to damages under the Due Process Clause, our opinion does not undermine the district court's determination that BJC was entitled to

injunctive relief. Appellees do not cross-appeal that decision. Cherry and Naeyaert debarred BJC from an FmHA program without following FmHA's own procedures for such a penalty. As the district court found, neither statutory law nor the Due Process Clause entitled BJC to a damages remedy. Nonetheless, the message to FmHA officials must be clear: They may not grant or deny the opportunity to participate in FmHA programs without following the agency's regulations. Conditioning important benefits upon a person's compliance with the arbitrary demands of government officials presents precisely the kind of potential power abuse that the debarment procedures are intended to prevent.

B. First Amendment Claim

[4] BJC argues that the debarment infringed upon its First Amendment right to petition the government for redress of grievances. According to BJC, appellees debarred it in retaliation for vigorously defending its rights in the Ferris cow dispute. BJC relies upon cases holding that retaliatory prosecution against individuals who pursue claims against the government infringes upon their First Amendment rights. *See, e.g., Haynesworth v. Miller*, 820 F.2d 1245 (D.C.Cir.1987).

The record plainly reveals that appellees used the opportunity to participate in the Florida loan guaranty program as a lever to coerce favorable settlement of the Ferris cow dispute. While such a tactic may be the norm between private parties, it has no place

in government. FmHA's debarment regulations provide procedural protection against such tactics. If FmHA's claim that BJC acted dishonestly had merit, then appellees could have used the debarment procedure to reach the intended result. Alternatively, if FmHA's claims lacked merit, then the procedure would have helped protect BJC from an erroneous debarment. These arguments provide additional justification for the district court's decision, reached on other grounds, to order BJC reinstated in the Florida loan guaranty program.

[5] Whether BJC may recover damages against Cherry and Naeyaert, however, presents a distinct question. The doctrine of qualified immunity protects government officials from civil liability

for any action which "does not violate clearly established or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). A right is clearly established only if the unlawfulness of the conduct that allegedly violates the right would have been apparent to an objective, reasonable official "in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Nicholson v. Georgia Dept. of Human Resources*, 918 F.2d 145, 147 (11th Cir.1990) (*citing Anderson v. Creighton*, 483 U.S. 635, 641-42, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). Because the purpose of qualified immunity is to "keep the public official out of the courtroom,

free to exercise discretionary duties under clearly established law without the constant threat of lawsuits," its determination on summary judgment is strongly favored. *Ansley v. Heinrich*, 925 F.2d 1339, 1347 (11th Cir.1991). *See also Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985); *Harlow v. Fitzgerald*, 457 U.S. at 818, 102 S.Ct at 2738.

The First Amendment right to petition the government for a redress of grievances includes a right of access to the courts. *See, e.g., NAACP v. Button*, 371 U.S. 415, 429-30, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963); *Haynesworth*, 820 F.2d at 1255. The law is clearly established that the government burdens this right when it prosecutes an

individual solely because that person refuses to release civil claims against the government. *See, e.g. Haynesworth*, 820 F.2d at 1255-57. *Cf. Wilson v. Thompson*, 593 F.2d 1375, 1386 (5th Cir.1979) (federal court may enjoin state criminal prosecution where it finds that purpose "to retaliate for or to deter" constitutionally protected conduct motivated prosecution). According to BJC, these retaliatory prosecution cases should have put appellees on notice that their debarment of BJC in order to coerce favorable settlement of the Ferris cow dispute infringed upon BJC's First Amendment right of access to the courts.

BJC offers no precedent upon which this court could base a holding that the government's use of debarment to coerce

the favorable settlement of a civil dispute unconstitutionally infringes upon a civil litigant's First Amendment rights. We do not reach that question, however, because we may hold appellees liable in this case only if the First Amendment right BJC asserts was clearly established at the time appellees engaged in the challenged conduct. *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039; *Nicholson*, 918 F.2d at 147. We hold that BJC's First Amendment right was not clearly established. The retaliatory prosecution cases upon which BJC relies are simply too far afield from the facts of the present case to put reasonable, objective officials on notice that BJC's debarment might infringe its First Amendment rights.

As the name implies, retaliatory prosecution involves criminal prosecution. Criminal prosecution triggers an array of constitutional, historical, and statutory considerations inapplicable to the specific situation presented here. Neither BJC nor its officers faced loss of freedom or lasting stigma associated with criminal prosecution. Any legal similarity between BJC's debarment, on the one hand, and criminal prosecution, on the other, would not have been readily apparent to government officials attempting to do their jobs on a day-to-day basis. In the absence of such an apparent similarity, viewed through the eyes of reasonable, objective government officials, BJC cannot overcome appellees' qualified immunity defense. *See Anderson*, 483 U.S.

at 640, 107 S.Ct, at 3039, *People of Three Mile Island v. Nuclear Regulatory Comm'n*, 747 F.2d 139, 144 (3d Cir. 1984).

We believe that one additional factor supports the district court's finding of qualified immunity in this case. In *Haynesworth*, the court noted that prosecutors appeared not to have any legitimate law enforcement objective in seeking release of the plaintiff's civil claims against the government. 820 F.2d at 1256-57. In the present case, however, where BJC was the defendant in a civil lawsuit that the government brought to recover its interest in the proceeds of a foreclosure sale, pursuit of settlement had many legitimate objectives. The government sought to protect the taxpayers' interest, without

protracted litigation, in collateral to which they had more than a colorable claim. Indeed, the district court later found that FmHA was entitled to a portion of the Ferris cow proceeds approximating the amount of FmHA's settlement offers to BJC. While we emphasize that FmHA's use of summary debarment was an improper method to coerce settlement of the Ferris cow dispute, the government's legitimate reasons for seeking settlement in the first place constitute another distinction between the present case and the retaliatory prosecution cases upon which BJC relies.[1]

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[1]In its petition for rehearing, BJC directs the court's attention to *Matzker v. Herr*, 748 F.2d 1142 (7th Cir.1984). In that case, the court held that a prison official could be held liable for damages where the official refused to transfer a prisoner to a safer cellblock solely because the prisoner complained to a judge about being kept in segregation. 748 F.2d

In conclusion, the district court properly found that appellees were entitled to qualified immunity on BJC's First Amendment claim, because the law was not clearly established that summary debarment of a government contractor in order to coerce favorable settlement of a civil dispute would infringe upon the contractor's First Amendment right of access to the courts.

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at 1150-51. We believe that *Matzker* does not compel a different result in this case for the same reasons that the retaliatory prosecution cases are distinguishable. Reasonable, objective public officials in appellees' position could not have been expected to analogize a case about prisoners' rights to the situation of a bank involved in a financial relationship with the government. Moreover, as in the retaliatory prosecution cases, the prison officer in *Matzker* had no legitimate purpose in seeking to force the prisoner to abandon his claim. In the present case, as discussed above, appellees sought to settle the Ferris cow dispute for legitimate reasons involving their duty to protect the public fisc.

Nonetheless, the link between appellees' actions and BJC's First Amendment rights is tenuous at best. Appellees' actions did not in fact dissuade BJC from fully defending its position in the Ferris cow dispute. The penalty of debarment in this case was not so severe as to infringe upon BJC's First Amendment rights in any way. More importantly, to prevail on its First Amendment claim, BJC must demonstrate that appellees' actions violated BJC's clearly established First Amendment rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The connection between appellees' actions and BJC's First Amendment rights is far too attenuated to overcome appellees' official immunity.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

GODBOLD, Senior Circuit Judge, specially concurring:

I concur in the court's opinion insofar as it affirms the conclusion reached on summary judgment that BJC suffered no loss of property interest.

I concur in the decision that no liberty interest was denied. I do so because plaintiff did not demonstrate the kind of injury to support a liberty

interest. Its evidence showed only that it lost the benefit of the particular government loan program. BJC did not prove that its loan-making ability was impaired in other respects (or in general) or that its banking activities other than the making of government guaranteed loans was injured.

I concur in the decision concerning alleged denial of right of access to the courts. The defendants tried to force the bank to settle the dispute concerning the cows before suit was filed, by using as a lever the threat of cutting off loan guarantees. This court's opinion recognizes that this was improper. But the attempt was unsuccessful. The agency filed suit against the bank, and the case was tried. BJC did not lose the benefit

of access to the courts but rather, as a defendant, enjoyed the benefit of the court as a forum in which to settle its dispute.

BANK OF JACKSON COUNTY,
Plaintiff-Appellant.
v.

L. JAMES CHERRY: RAYMOND G. NAEYAERT. Defendants-

Appellees.

No. 91-3547

United States Court of Appeals.

Eleventh Circuit

July 27, 1992

Appeal from the United States District Court For the Northern District of Florida.

Before HATCHETT and DUBINA. Circuit Judges, and GODBOLD, Senior Circuit Judge.

HATCHETT. Circuit Judge:

In this appeal, we affirm the district courts ruling that Farmers Home Administration (FmHA) officials did not deprive a bank of First Amendment, Liberty, or property, rights when they debarred the bank.

FACTS

The bank of Jackson County (BJC) is a small bank in northwest Florida. In September, 1981, BJC loaned money to Elmer and Shirley Ferris to purchase forty-six dairy cows. The Farmers Home Administration, a federal agency, guaranteed the loan. In 1982, when the Ferrises began surreptitiously removing their cattle from Florida, BJC took possession of the cows remaining at the

Ferrises' farm. BJC and FmHA sold the cows jointly and put the proceeds into a joint account.

In September, 1984, BJC informed FmHA that it had begun applying funds from the joint account to its debts. FmHA objected, and a dispute followed. In July, 1986, FmHA informed BJC that it would not negotiate further over ownership of the funds until BJC restored the amounts that it had withdrawn from the account.

For nearly two years, FmHA did not communicate again with BJC regarding the Ferris cow dispute. Then, on April 14, 1988, Raymond G. Naeyaert, Florida chief of FmHA farmer programs, instructed the FmHA supervisor in Holmes County not to

issue a conditional commitment for an FmHA guarantee on a BJC loan to a local farmer named Adron Miller. Naeyaert told the supervisor that he was not to conduct any further business with BJC because of the unresolved dispute over the Ferris proceeds.

The same day, an Assistant United States Attorney for the Northern District of Florida, Benjamin Beard, wrote a letter to the General Counsel's Office of the U.S. Department of Agriculture in Atlanta. In relevant part, Beard stated:

> [A]s I understand the facts of this case, [BJC] officials *intentionally and with knowledge misrepresented their actions* in the case and thereafter flatly

> refused to comply with their represented agreement. At the very least that *is civil fraud* and in my view demonstrates that the *bank officials do not believe that they are required to deal in a forthright and ethical manner with the government.*

If that is their belief, then I believe it is exceedingly unwise to enter into any financial transaction with them wherein the FmHA would have to rely on these officials to conduct servigin [sic] and to deal honestly with the FmHA.... [Emphasis added.]

On May 5, 1988, Ted Elders, an Agriculture Department attorney, wrote to L. James

Cherry, Florida state director of the FmHA, agreeing with Beard's opinion. Elders suggested that Cherry consider withdrawing from pending transactions involving BJC and refuse to undertake any new transactions with the bank.

On June 1, 1988, Cherry wrote to BJC stating that (1) FmHA would not "enter into any loan guaranty submitted by [BJC]"; (2) FmHA would honor existing guaranties: and (3) FmHA was terminating its Treasury Limited Account with BJC on July 1, 1988. The reason for these actions, according to Cherry, was BJC's refusal to negotiate in "good faith" over the Ferris cow dispute. Cherry and Naeyaert, the appellees, admitted that the purpose of the letter was to discontinue all further dealings with BJC in Florida,

except those relating to existing guaranties. FmHA's Alabama office, however, continued to issue guaranties on new BJC loans.

In July, 1988, Glen Walden, the acting Florida director of the FmHA, wrote to BJC rejecting its latest settlement offer in the dispute over the Ferris proceeds. Walden reaffirmed FmHA's earlier settlement offer and encouraged BJC to accept it. In doing so, Walden states:

> I am confident that when you consider the alternatives you will agree to settlement more in line with what we are able to accept so we may

> discontinue the proposed litigation and resume normal relations between the bank and FmHA.

BJC did not accept FmHA's settlement offer and on September 9, 1988, FmHA sued BJC over the Ferris proceeds.

FmHA's Florida office continued to refuse to issue new guaranties on BJC loans. In February, 1989, Naeyaert wrote the Jackson County FmHA supervisor, rejecting his request for a guaranty on a BJC loan to Charles M. Patrick, a local farmer. Naeyaert stated that FmHA would not issue new guaranties on BJC loans because of the bank's failure to negotiate in "good faith" in the Ferris cow dispute. Around this same time, Cherry approved two

BJC loan renewals, but reiterated that his office would not issue any new guaranties.

Appellees also continued to use the guaranty program as a lever to force resolution of the Ferris dispute. On May 5, 1989, Cherry met with Thomas W. Wilder, BJC's president, at a "fish fry" for Agriculture Secretary Clayton Yeutter in Marianna, Florida. Wilder stated his belief that FmHA had "debarred" BJC without following the proper procedural requirements for that penalty. Cherry responded that the Florida FmHA office would resume its business relationship with BJC as soon as the Ferris cow litigation was settled.

In April, 1990, the District Court for the Northern District of Florida

entered judgement in the Ferris cow litigation, finding BJC entitled to $25,000 and FmHA entitled to $62,000. Although the dispute was thereby resolved, FmHA did not resume its business relationship with BJC.

PROCEDURAL HISTORY

BJC brought this *Bivens* action against Cherry and Naeyaert alleging that termination of the business relationship with FmHA ("debarment") deprived BJC of its constitutional rights. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In particular, the complaint alleged that termination of the business relationship,

without following procedural requirements contained in FmHA regulations, deprived BJC of liberty and property without due process of law. The complaint further alleged that the debarment penalized BJC for exercising its First Amendment right to petition the government for a redress of grievances in the Ferris cow dispute. BJC sought damages against appellees in their individual capacities and injunctive relief in their official capacities.

The district court entered summary judgement for appellees on the damages claims and for BJC on the injunctive claim. The court found that FmHA failed to follow its own debarment regulations, and ordered BJC reinstated "as a viable participant in the Florida FmHA programs." The court found, however, that the

debarment did not deprive BJC of a liberty or property interest. In the alternative, the court held that appellees were immune from suit under the qualified immunity doctrine, because any deprivation did not violate BJC's clearly established constitutional rights. Similarly, the court held that appellees' actions did not violate BJC's clearly established First Amendment rights.

BJC appealed from the district court's entry of summary judgement for appellees on the damages claims. Appellees do not cross-appeal from the injunction ordering BJC reinstated in FmHA lending programs.

CONTENTIONS OF THE PARTIES

BJC contends that appellees deprived it of clearly established liberty and property interests without due process of law when they debarred it without following FmHA's debarment procedures. BJC also contends that the debarment violated its clearly established First Amendment right to petition the government for redress of grievances. Appellees respond that the debarment did not deprive BJC of liberty or property. To the extent that the debarment did work such a deprivation, however, BJC's rights were not clearly established. Thus, appellees are immune from suit under the qualified immunity doctrine. Appellees also contend that the debarment did not violate any of BJC's clearly established First Amendment rights.

ISSUES

The issues presented are:

(1) Whether the debarment deprived BJC of clearly established liberty or property rights without due process of law; (2) whether the debarment violated BJC's clearly established First Amendment rights.

DISCUSSION

A. Due Process Claim

The government may not deprive any person of "life, liberty or property without due process of law." U.S. Const. amend. V. BJC argues that it had a

property interest in FmHA's loan guaranty program. Moreover, BJC argues that appellees deprived it of liberty when they debarred it from that program on the basis of "stigmatizing" allegation. Because appellees deprived BJC of these constitutionally protected interests without affording it the process due under the Fifth Amendment, BJC argues it is entitled to damages.

[1] To prevail upon its procedural due process claim, BJC must establish: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation. *See Lehr v. Robertson,* 463 U.S. 248, 256, 103 S.Ct 2985, 2990-91, 77 L.Ed.2d 614

(1983); *Greenholtz v. Inmates of the Nebraska Penal and Correction Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103-04, 60 L.Ed.2d 668 (1979); *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S.Ct 2701, 2705-06, 33 L.Ed.2d 548 (1972). Failure to establish any one of these elements is fatal to BJC's due process claim.

1. *Property Interest*

[2] A property interest must rest upon "a legitimate claim of entitlement." *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. Courts have consistently held that "no citizen has a 'right' ... to do business with the government." *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C.Cir.1964); *see also Sutton v. U.S. Dept. of Housing*

and Urban Development, 885 F.2d 471, 474 (8th Cir. 1989) (individual had no constitutionally protected property interest in membership on panel of government approved property appraisers); *ATL, Inc. v. United States*, 736 F.2d 677, 683 (Fed.Cir.1984) (suspended contractor has no property interest in government contracts); *Transco Security, Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir.1981) (right to bid on government contracts is not a property interest).

BJC points to no "independent source" of law securing to it the right to participate in FmHA's loan guaranty program. *See Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. While BJC surely attaches great importance to FmHA loan guaranties, our analysis must focus not upon the weight of BJC's

interest, but upon the "nature" of that interest. *Roth*, 408 U.S. at 570-71, 92 S.Ct. at 2705-06. Simply put, federal law does not create an entitlement to FmHA loan guaranties. Thus, the "nature" of BJC's interest in such guaranties is "an abstract need or desire" to obtain them. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. Because BJC is not entitled to FmHA loan guaranties, it has no property interest in them.

BJC relies heavily upon *Gonzalez v. Freeman* to support the property right it asserts in this case. But *Freeman* held no more than that debarment works a sufficient economic injury on the plaintiff to confer standing. 334 F.2d at 574-75. It did not hold that the plaintiffs in that case had a property

interest in doing business with the government. Indeed, the court explicitly recognized that contractors have no such right. 334 F.2d at 574. The holding in *Freeman* that debarment works a sufficient economic injury to confer standing is insufficient to overcome the weight of more recent cases, holding uniformly that suspended or debarred contractors have no property interest in doing business with the government. *See Sutton,* 885 F.2d at 474; *ATL,* 736 F.2d at 683; *Transco,* 639 F.2d at 321.

2. *Liberty Interest*

[3] Liberty interests are both broader and more difficult to define than property interests. While property exists

in concrete entitlements secured by independent sources of law, liberty interests cannot be so easily characterized. As the Supreme Court stated nearly seventy years ago:

> [Liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of

> his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Roth*, 408 U.S. at 572, 92 S.Ct. at 2707. This broad conception of liberty encompasses a person's interest in his or her reputation, coupled with the more tangible benefits or entitlements which rest upon a

person's good name. *See Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160-61, 47 L.Ed.2d 405 (1976).

The Supreme Court defined this liberty interest in reputation in a series of cases decided in the 1970's. In *Roth*, the Court held that a state university's refusal to renew the contract of a nontenured professor did not deprive the professor of a liberty interest, because the state made no charges against the professor "that might seriously damage his standing and associations in his community." 408 U.S. at 573, 92 S.Ct. at 2707. The state did not impose upon the plaintiff "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. at 573, 92

S.Ct. at 2707. In *Paul*, the Court addressed the reverse situation. There, the Court held that the state's widespread defamation of the plaintiff did not deprive him of liberty, because the damage to reputation was not accompanied by any tangible loss. 424 U.S. at 701, 96 S.Ct. at 1160-61. Finally, in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), the Court held that termination of a police officer for alleged misconduct did not infringe upon the officer's liberty, because the city did not publicly disclose the allegations of misconduct. 426 U.S. at 348, 96 S.Ct. at 2079.

[4] Thus, to prevail on a claim that government action deprived the plaintiff of a liberty interest in reputation, the

plaintiff must show: (1) a stigmatizing allegation, *Roth*, 408 U.S. at 573, 92 S.Ct. at 2707; (2) dissemination or publication of that allegation, *Bishop*, 426 U.S. at 348, 96 S.Ct. at 2079; *Roth*, 408 U.S. at 573-74, 92 S.Ct. at 2707-08; and (3) loss of some tangible interest due to publication of the stigmatizing allegation. *Paul*, 424 U.S. at 701, 96 S.Ct. at 1160-61; *Roth*, 408 U.S. at 573-74, 92 S.Ct. at 2707-08. *See also Larry v. Lawler*, 605 F.2d 954, 957 (7th Cir.1978) (summarizing the Supreme Court's liberty interest doctrine).

Federal circuit courts of appeal have applied this line of cases to hold that suspension or debarment of a government contractor on the basis of stigmatizing

allegations deprives the contractor of liberty under the due process clause. *See ATL, Inc. v. United States*, 736 F.2d 677, 683 (Fed.Cir. 1984); *Transco Security, Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir.1981); *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 966 (D.C.Cir.1980). BJC argues that its debarment from the Florida FmHA loan guaranty program constituted the "tangible loss" required by *Paul*, and that FmHA's accusations of bad faith constituted the stigmatizing allegations required by *Roth*.

[5,6] Although the question is a close one, we hold that appellees' actions in this case did not deprive BJC of any constitutionally protected liberty interest. Assuming for purposes of this discussion that FmHA's accusation of bad

faith constituted a stigmatizing allegation, that allegation was neither sufficiently publicized, nor sufficiently injurious, to deprive BJC of liberty under the Due Process Clause.

A stigmatizing allegation does not implicate liberty interests unless it is publicized. *See Bishop*, 426 U.S. at 348, 96 S.Ct. at 2079; *Roth*, 408 U.S. at 573-74, 92 S.Ct. at 2707; *Sutton*, 885 F.2d at 475. In the instant case, FmHA communicated its accusations of BJC's bad faith only to BJC itself and to two FmHA county supervisors in Florida. In addition, appellees communicated the facts of the Ferris cow dispute to an assistant U.S. attorney for the Northern District of Florida and to Department of Agriculture lawyers. As in *Bishop* and *Sutton*, where

the courts found no deprivation of liberty, appellees did not disclose any negative information about BJC to the public. And, although appellees discussed BJC's case with government lawyers, they did not communicate the allegations of BJC's misconduct to any other government agency.

BJC argues that the scope of publication was sufficiently broad to impose a tangible injury. BJC's president stated in an affidavit that he "felt obliged" to disclose to potential qualified borrowers that BJC was ineligible for FmHA loan guaranties. In addition, communication of the bad faith charges to FmHA's county supervisors ensured that BJC would receive no new loan guaranties in Florida. According to BJC,

the allegation of bad faith, coupled with the tangible loss of the opportunity to participate in FmHA's Florida loan program, was sufficient to deprive it of liberty under the Due Process Clause.

We disagree. All of the cases upon which BJC relies involved a much broader injury to the contractor than BJC suffered in this case. In *Old Dominion*, the court found that the contractor relied upon the Department of Defense for nearly "100 percent" of its business; that suspension "effectively put Old Dominion out of business", and that "the government action in this case effectively foreclosed Old Dominion's freedom to take advantage of other government employment opportunities and barred [it] from all public employment." 631 F.2d at 956, 963-64. In

Transco, the defendant official suspended Transco from bidding on all General Services Administration contracts. 639 F.2d at 320. Finally, in *ATL, Inc.*, the court found that ATL's "work is done almost entirely with the federal government," and that the Navy's suspension prevented it "from further contracting with any federal government agency." 736 F.2d at 679-80.

The injury to BJC pales in comparison to the injuries found in the above-cited cases. BJC's president testified that "twenty to twenty-five percent" of BJC's outstanding loans were "made for agricultural purposes." Even if all of those loans involved FmHA guaranties, a fact not borne out by the record, BJC would not be as dependent upon the

foreclosed government program as were the plaintiff contractors in *ATL*, *Transco*, and *Old Dominion*. Appellees' debarment of BJC from Florida FmHA loan programs had only a limited impact on BJC. FmHA continued to guaranty BJC's loan renewals in Florida, and it continued to guaranty all of BJC's loans in Alabama. BJC introduced no evidence that appellees' actions affected its dealings with any other government agency besides the Florida FmHA office.

The affidavit of BJC's president stating that he "felt obliged" to disclose BJC's debarment does not compensate for the deficiencies in BJC's case. The bare statement of the affidavit does not tell us how many potential customers the bank lost because of these disclosures. In addition, the government imposed no duty

upon BJC to disclose the *reason* for its debarment. Without disclosure of the stigmatizing allegation, the mere loss of BJC's government benefit did not infringe upon its liberty interests. *Bishop*, 426 U.S. at 348, 96 S.Ct. at 2079; *Roth*, 408 U.S. at 573-74, 92 S.Ct. at 2707.

These distinctions from prior cases amount to an important difference. Simply put, appellees' actions in this case did not deprive BJC of its constitutionally protected liberty. BJC remained free to obtain FmHA guaranties for loan renewals in Florida, and for all loans in Alabama. It remained free to do business with any of the numerous federal agencies that deal with banks. And finally, BJC remained fully free to conduct the seventy-five to eighty percent of its business that was

unrelated to agriculture.

The loss of one particular kind of government loan guaranty in a limited geographical area, constituting a limited portion of BJC's business, did not impose so severe a constraint on the bank's freedom that it may be called a deprivation of liberty. *See Roth*, 408 U.S. at 573-74, 92 S.Ct. at 2707; *Sutton*, 885 F.2d at 475. If BJC were as dependent upon new FmHA loan guaranties in Florida as the suspended and debarred plaintiffs were on government contracts in *ATL*, *Transco*, and *Old Dominion*, this case might have a different outcome. On these facts, however, we cannot conclude that appellees' actions deprived BJC of liberty.

[7] Although we hold that BJC is not entitled to damages under the Due Process Clause, our opinion does not undermine the district court's determination that BJC was entitled to injunctive relief. Appellees do not cross-appeal that decision. Cherry and Naeyaert debarred BJC from an FmHA program without following FmHA's own procedures for such a penalty. As the district court found, neither statutory law nor the Due Process Clause entitled BJC to a damages remedy. Nonetheless, the message to FmHA officials must be clear: They may not grant or deny the opportunity to participate in FmHA programs without following the agency's regulations. Conditioning important benefits upon a person's compliance with the arbitrary demands of government officials presents precisely the kind of

potential power abuse that the debarment procedures are intended to prevent.

B. First Amendment Claim

[8, 9] BJC argues that the debarment infringed upon its First Amendment right to petition the government for redress of grievances. According to BJC, appellees debarred it in retaliation for vigorously defending its rights in the Ferris cow dispute. BJC relies upon cases holding that retaliatory prosecution against individuals who pursue claims against the government infringes upon their First Amendment rights. *See, e.g., Haynesworth v. Miller*, 820 F.2d 1245 (D.C.Cir.1987).

The record plainly reveals that appellees used the opportunity to

participate in the Florida loan guaranty program as a lever to coerce favorable settlement of the Ferris cow dispute. While such a tactic may be the norm between private parties, it has no place in government. FmHA's debarment regulations provide procedural protection against such tactics. If FmHA's claim that BJC acted dishonestly had merit then appellees could have used the debarment procedure to reach the intended result. Alternatively, if FmHA's claims lacked merit, then the procedure would have helped protect BJC from an erroneous debarment.

Nonetheless, the link between appellees' actions and BJC's First Amendment rights is tenuous at best. Appellees' actions did not in fact

dissuade BJC from fully defending its position in the Ferris cow dispute. The penalty of debarment in this case was not so severe as to infringe upon BJC's First Amendment rights in any way. More importantly, to prevail on its First Amendment claim, BJC must demonstrate that appellees' actions violated BJC's clearly established First Amendment rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The connection between appellees' actions and BJC's First Amendment rights is far too attenuated to overcome appellees' official immunity.

CONCLUSION

For the foregoing reasons, the judgement of the district court is affirmed.

AFFIRMED.

GODBOLD, Senior Circuit Judge, concurring in part and dissenting in part:

I agree with our decision insofar as it affirms the conclusion reached on summary judgement that plaintiff bank suffered no loss of property interest.

I believe that the liberty interest claim could not properly be denied by a summary judgement and that, in addressing the liberty interest issue, both the district court and this court have read

the relevant case law too narrowly.

With respect to the liberty interest claim, the district court held:

> Although the broad language of *Gonzalez* [*Gonzalez v. Freeman*, 334 F.2d 570 (D.C.Cir. 1964)] implied a deprivation of property basis, more recent cases have held that a government contractor has no constitutionally protected "*property*" interest in this situation, but in certain circumstances a "liberty" interest may be implicated where the suspension is

based on charges of fraud or dishonesty, and some stigmatizing publication occurs. *See ATL, Inc. v. United States*, 736 F.2d 677, 683 (Fed.Cir. 1984); *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir.), *cert. denied*, 454 U.S. 820, 102 S.Ct. 101, 70 L.Ed.2d 90 (1981); *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953, 962 (D.C.Cir.1980). Though plaintiff argues that it was accused of bad faith dealings in this case, the lack of any evidence in the record of outside

> publication of these accusations, even if they were sufficient to trigger constitutional concerns, destroys any claim of a violated liberty interest. I therefore conclude that plaintiff has neither a property nor liberty interest upon which to base its claim.

The Plaintiff bank is a small-town operation, located in Graceville, Florida, a town shown by the 1990 Rand McNally Road Atlas to have a population of 2,918. It is located in Jackson County, a predominately rural county that abuts the Florida-Alabama state line a few miles north of Graceville. FmHA notified its

county supervisors in Jackson and an adjoining Florida county that it would not guarantee agricultural loans made by the plaintiff bank because "bad faith" in a civil dispute between the bank and FmHA over the proceeds of the sale of cattle in which both had an interest. Thus the notice reached the relevant Florida market for agricultural loans made by this rural bank. FmHA's action in Florida was made known to FmHA in Alabama, which did not decline to guarantee agricultural loans that were made by the bank to farmers across the Alabama state line, a few miles away, because it did not consider the action in Florida a debarment.

In a deprivation of liberty interest case a court necessarily must inquire into what it was that the defendant did or said

that adversely affected the plaintiff and what impact the defendant's statements or actions had on the plaintiff. *Bd. of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), concerned the refusal of a public university to reemploy a nontenured university instructor. The Court held that a simple refusal to rehire, without more, did not trigger due process requirements. The Court noted however that the charges made were not such as might seriously damage the plaintiff's standing and associations in his community, and that had the charge done so, "this would be a different case." It also noted that the stigma or other disability did not foreclose the plaintiff's freedom to take advantage of other employment activities: for example, plaintiff was not barred from all other

public employment in state universities. Again, had this occurred it "would be a different case."

Roth's liberty interest principles have been applied to plaintiffs deprived of access to government contracts or services, in cases referred to by the district court and this court. *ATL, Transco, and Old Dominion, supra.* The liberty interest of a bidder (and, inferentially, of one denied access to government services) is affected "when that denial is based on charges of fraud or misconduct." *Transco*, 639 F.2d at 321 (citing *Old Dominion*).

There is no issue in this case concerning what FmHA said and did. Both the district court and this court assume

that FmHA's charge that the bank dealt in "bad faith" in the dispute over mortgaged cattle was sufficiently stigmatizing. Indeed any other conclusion would not be justified. Inquiry into the impact of what FmHA said divides into two overlapping inquiries: to whom were the allegations communicated and what were the consequences of the remarks? The district court held that the statements were not made to enough of an audience, i.e., there was no "outside publication." But the purpose of inquiring into the scope of the audience to whom publication was made is but a part of the inquiry into impact upon the plaintiff. "Outside" versus "inside" are not per se determinative factors but merely aids to analysis in the light of all the circumstances. They are part of the overall inquiry into impact on the

plaintiff. The district court erred in treating lack of "outside publication" as the sole basis for decision. The crucial fact is that FmHA's notice to its supervisors in the bank's Florida market area created a plenary exclusion from access to FmHA loan guarantees in Florida. That the exclusion was implemented through word to only a few "insiders" does not diminish the impact.

On appeal this court supplements the district court's conclusion of "inside publication" by noting that FmHA's charges of misconduct by the bank were not communicated to other government agencies. But nothing in the summary judgement record supports an inference that this rural bank's needs for guarantees of agricultural loans could be met by some

other government agency. It is not required for an actionable liberty interest claim by the bank that its alleged wrongdoing has been made known to, for example, the Federal Reserve System or the Federal Deposit Insurance Corporation, who have no relation to the function of the FmHA or to the adverse affect on the bank's market for agricultural loans.

I turn to the inquiry into the consequences of defendant's statements. The district court did not refer to this quantitative measurement. On appeal this court compares the bank's summary judgment showing of consequences to the much more serious consequences shown in other cases, and finds them wanting. In *Old Dominion* the court pointed out that the governmental action effectively put the

plaintiff out of business. But this was a factual distinction, a response to the statement in *Roth* that the plaintiff would have a "different case" if he had been foreclosed from all public employment in state universities. Old Dominion had been shut out of its sole business, supplying dairy products by contracts with the Armed Forces. This factual distinction brought Old Dominion within the "different case" reference in *Roth*. This distinction did not establish a principle that a deprivation of a liberty interest can only arise when the victim's business enterprise is wholly destroyed. Of course there must be evidence of injurious consequence to the plaintiff. But once there is a showing of a substantial adverse impact beyond the range of *de minimis*, a fact-finder may conclude that

the liberty interest is adversely affected. *Old Dominion*, *Transco*, and *ATL* are all "total destruction" cases. But they do not establish a principle that a right to recover for injury to one wrongfully excluded from access to government programs exists only when there is total destruction. There is no scorched earth requirement. Rather inquiry must be made in terms of the effect upon the wronged plaintiff's relevant market for the government services the access to which plaintiff has lost. This plaintiff lost all access to FmHA loan guarantees in its Florida market by notice given to the persons who controlled that access. This was the only service FmHA had offered to the bank. The bank was entitled to a trial at which it could be determined whether this was a

sufficient impact.

None of the cases relied on to affirm the summary judgment denial of the bank's liberty interest claim is a summary judgment case. *Old Dominion* was decided after a three-day evidentiary hearing. *Transco* was a suit for an injunction, and it is obvious from the Sixth Circuit's opinion that the record was generous. *ATL* reached the Federal Circuit from an injunction against the Navy granted by the Claims Court in two reported decisions that reveal a substantial record. See 736 F.2d at 679, n. 1.

The bank is entitled to a trial on its liberty interest claim.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

BANK OF JACKSON COUNTY,

Plaintiff,

v. Case No. 89- 50062-RV

L. JAMES CHERRY and
RAYMOND G. NAEYAERT,

Defendants.
_____/

ORDER

Pending are cross-motions for summary judgment filed by defendants (doc. 110) and plaintiff (doc. 112). My rulings on the issues raised by these motions are set out below.

I. INTRODUCTION.

The factual background of this case is discussed in my previous order granting partial summary judgment for defendants. [See doc. 81, at 3-4.] Additional factual details will be brought out in this order

as necessary. Essentially, the local office of the Farmers' Home Administration (FmHA) terminated its business relationship with plaintiff, the Bank of Jackson County (BJC), because of a business dispute between them. Plaintiffs' only remaining claim is its claim that (1) the termination constituted a "debarment" under FmHA regulations, (2) the procedural safeguards required under the debarment regulations were not afforded plaintiff, and (3) therefore, defendants have violated plaintiff's due process rights. Plaintiff seeks damages against defendants in their individual capacity, and injunctive relief against them in their official capacity.

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories

and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of Law." Rule 56(c), Fed.R.Civ.P. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). An issue of fact is "material" if it might affect the outcome of the case under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. See Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party is entitled to judgment as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case to which the nonmoving party has the burden of proof." Cornelius v. Town of Highland lake, 880 F.2d 348, 351 (11th Cir. 1989), cert. denied sub nom., Spears v. Cornelius, __ U.S __, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990). However, summary judgment is improper "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." Id.

On a summary judgment motion, the record and all inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. Furthermore, the court must consider the

entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. See Clinkscales v. Chevron USA, Inc., 831 F.2d 1565, 1570 (11th Cir. 1987).

II. SERVICE OF PROCESS.

Plaintiff seeks injunctive relief against the defendants in their official capacity as representatives of the United States government, as well as damages against the defendants in their individual capacity. regarding the former, the defendants argue that the plaintiff has never served the United States as required by Rule 4(d)(4), Federal Rules of Civil Procedure. This subsection requires service of the summons and complaint upon a representative of the local United States Attorney's office in suits against the United States. In this case, the

plaintiff served only defendants Cherry and Naeyaert, the FmHA officials. Pursuant to Rule 12, Federal Rules of Civil Procedure, defendants move for dismissal on this ground, arguing that this court is without jurisdiction to order injunctive relief against the government because the government has never been served.

I find that the defendants have waived any objection to improper service. Rule 12(g) provides in pertinent part:

> If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds

there stated.[1]

Rule 12(g), Fed.R.Civ.P. Further, Rule 12(h)(1), entitled "Waiver or Preservation of Certain Defenses," specifically lists an objection to service of process as a defense which will be waived if not asserted in the first motion or responsive pleading:

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g)....
>
> Rule 12(h)(1), Fed.R.Civ.P.

Defendants filed their first motion to dismiss, or in the alternative, for

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[1] The exceptions referred to in Rule 12(h)(2) do not apply. They are defenses of (1) failure to state a claim upon which relief can be granted, (2) failure to join an indispensable party, and (3) failure to state a legal defense to a claim.

summary judgment, on June 21, 1989. (Doc.8). That motion contained no objection to improper service of process. Accordingly, under Rule 12(g) and 12(h), that objection has been waived.

III. INJUNCTIVE RELIEF.

(a). Whether Plaintiff was "Debarred" Under the Regulations. Plaintiffs seek summary judgment on their claim for injunctive relief, arguing that the record demonstrates that it was in fact debarred without the requisite procedure. I have already ruled that plaintiff would be entitled to injunctive relief if defendants "debarred" it without following the FmHA regulations. This is because a federal agency must abide by the procedure provided in its regulations, even though the regulations are more stringent than constitutionally required.

Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974); Payne v. Block, 714 F.2d 1510, 1517 (11th Cir. 1983), rev'd on other grounds sub nom. Lyng v. Payne, 476 U.S. 926, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986).

Morton v. Ruiz, supra, concerned an internal manual of the Bureau of Indian Affairs which limited benefits to Indians living "on reservations." The manual provided that all Bureau directives that "inform the public of ... benefits available" were to be published in the Federal Register or the Code of Federal Regulations. 415 U.S. at 234-235. Finding that the "on reservations" restriction was within this category of directives which must be published, the Court's opinion notes:

> Where the rights of individuals are affected, it is incumbent

> upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.... Before the [Bureau] may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures.
>
> Id. at 235, citing Service v Dulles, 354 U.S. 363, 388, 1 L.Ed.2d 1403, 77 S.Ct. 1152 (1957); Vitarelli v Seaton, 359 U.S. 535, 539-540, 3 L.Ed.2d 1012, 79 S.Ct. 968 (1959).

Payne v. Block, supra, like this case, involved FmHA regulations. The plaintiff claimed that the FmHA had failed to give adequate notice of filing deadlines for disaster relief loans, as provided for in FmHA regulations. Citing Morton, the Eleventh Circuit discussed the legal basis for its decision to affirm an award of injunctive relief:

> The liability of the agency in this case is grounded in Congress' enactment of

> legislation directing the Department of Agriculture to implement the terms of the legislation, the agency's passage of implementing regulations, and the agency's failure to follow the resulting affirmatively required procedure. An agency must follow its own procedure even though the procedure is more stringent than would constitutionally be required.
>
> 714 F.2d at 1517 (citations omitted).]

Defendants admit that they did not follow the debarment regulations in taking their actions concerning BJC.[2] Thus, the

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[2] The regulations provide for, among other things: (1) notice of debarment proceedings, including a statement of grounds for debarment; (2) an opportunity to file a written response; (3) a meeting with an FmHA representative to rebut the charges; (4) written notification of the adjudication, including grounds for any adverse action taken; and (5) a right of appeal. See 7 C.F.R. §1924.216 (1988). For a more detailed description of the elaborate procedural mechanisms in force at the time, see doc. 111, at 18-19.

narrow issue to be decided on the claim for injunctive relief is whether those actions constituted a "debarment," which was defined in the FmHA regulations in effect at the time as:

> the exclusion from participation in any FmHA program for a reasonable time commensurate with the seriousness of the person's offense or failure, or the inadequacy of his performance.

7 C.F.R. §192.302(b) (1988) [doc. 10, Ex. 4].[3] Defendants maintain that their actions constituted "something less" than a debarment; namely, a decision to stop engaging in future commitments with BJC.

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[3] The debarment regulations were later amended, with the current FmHA debarment regulation published on April 11, 1989, at 54 Fed. Reg. 14333. Citations in this order refer to the regulations in effect in the spring and summer of 1988, copies of which are attached as exhibits to plaintiff's memorandum in opposition to defendants' original motion for summary judgment. See doc. 10, Exs. 3 & 4.

See, e.g., doc. 125, at 6.

(1). **Facts**. The relevant facts on this issue are not in dispute. Defendant L. James Cherry is the Florida State Director of FmHA, and held that position during the relevant time period. Defendant Raymond G. Naeyaert is the Florida Chief of Farmer Programs, second only to Cherry in all FmHA matters concerning farmers and farming in Florida. Throughout the 1980s, BJC and FmHA had an ongoing business relationship. FmHA and BJC participated in joint loans to farmers, FmHA guaranteed loans by BJC to farmers, and FmHA deposited its account funds with BJC.

Other than a dispute over how the sales proceeds would be allocated with regard to a loan made to Elmer and Shirley Ferris, defendants Cherry and Naeyaert

were aware of no problems with BJC before April 1988. At that time, James Aubrey Sapp, the Holmes County Supervisor of the FmHA, was considering BJC's request for a guarantee on a loan to a farmer named Adron Miller. Sapp was ready to deliver a "conditional commitment" approving the loan. On April 14, 1991, Naeyaert discussed the Miller loan with Sapp in person at the Holmes County FmHA office. Naeyaert told Sapp that FmHA "shouldn't be working with them [BJC]" because of "past dealings on Elmer and Shirley Ferris." Naeyaert instructed Sapp not to issue the conditional commitment on the Miller loan and not to issue "anything on that or any other case to [BJC]."[4]

On June 1, 1988, Cherry signed a

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[4] See pretrial stipulation , doc. 116, at 7.

letter drafted by Naeyaert, addressed to Tom Heisler, Executive Vice President of BJC. Referring to the Ferris cow proceeds dispute, the letter stated,

"You have steadfastly refused to negotiate in what we consider to be good faith." Doc. 114, Ex. B. The letter announced that (1) FmHA would not "enter into any loan guarantees submitted by [BJC]"; (2) existing guarantees would be honored; and (3) FmHA was terminating its treasury limited account effective July 1, 1988. Id.

Cherry stated at deposition that it was his intention in writing this letter to "discontinue doing further business with the Bank" as to all FmHA programs "until further notice." Cherry dep. at 71. Naeyaert testified at deposition that the result of the June 1, 1988, letter was

that FmHA would not enter into any "future obligations" with BJC. The programs listed in the letter were, as far as Naeyaert knew, the only programs in which BJC participated; he was aware of no FmHA program in which BJC could participate after the June 1, 1988, letter. Naeyaert dep. at 24-26.

On February 28, 1989, Naeyaert wrote a letter to Charles Snell, Jackson County FmHA Supervisor, instructing him not to approve BJC's application for a line of credit to Charles M. Patrick, a Jackson County farmer, under the guaranteed loan program. The letter was in response to a request for approval from Snell. The cited reason was the government's litigation against BJC over the Ferris cow dispute, as well as the alleged failure of BJC to "negotiate in <u>good faith</u>". Doc.

114, Ex. D. The government had initiated the Ferris litigation on September 9, 1988.

On January 24, 1989, and on March 1, 1989, Cherry wrote letters to BJC's Executive Vice President Tom Heisler, approving renewals of guarantees to lines of credit on two BJC loans. Id., Exs. E & F. In each case, the line of credit had been approved prior to June 1, 1988, for a three-year period, subject to annual renewal upon review of the borrower's operation. Cherry dep. at 73. Each letter stated that the renewal was made "only to prevent a hardship" to the borrower, and that it "should not be considered to be a modification or reversal of our position ...". Doc. 114, Exs. E & F.

Judgment was entered in the

underlying Ferris litigation on April 14, 1990. Out of the total cow sale proceeds of $87,146.02, BJC received $24,909.84, and was ordered to pay FmHA the remaining $62,236.18. See United States v. Bank of Jackson County, No. 88-50117, doc. 127 (N.D. Fla. April 16, 1990). No interest was sought or awarded, and BJC satisfied the judgment on April 28, 1990. Nevertheless, the termination of business relations announced in the June 1, 1988, letter continues to be in effect.

(2). Applicability of the Regulations. A review of these facts indicates that the plaintiff suffered a debarment within the meaning of the FmHA regulations, regardless for the defendant's characterization of their actions. The effect of the defendants' decision was "the exclusion from

participation in ... [an] FmHA program" -- - i.e., the Guaranteed Loan Program. By telling BJC that it had "steadfastly refused to negotiate in ... good faith, " the June 1, 1988, letter indicates "the person's offense or failure." The pretrial stipulation refers to the defendants' decision as a decision to "stop doing business with the Bank." Doc. 116, at 9. Even Cherry admits that the action might have been a "suspension," another adverse action requiring formal procedures under the regulations and defined as "the temporary disqualification from FmHA programs in conjunction with debarment proceedings." Cherry dep. at 108; 7 C.F.R. §1924.203(c) (1988).

Nonetheless, defendants make several arguments against such an interpretation. First, defendants rely on the fact that

existing guarantee arrangements were unaffected. I do not find that to be determinative. The application of the penalty to all future loan agreements is not necessarily inconsistent with the regulations' definition of debarment or suspension. Moreover, nothing in the rest of the regulations indicates that a debarment or suspension must affect existing contracts with the FmHA.

Second, defendants note that the FmHA approved two guarantees after June 1, 1988. Actually, these were renewals of lines of credit established prior to that date. More importantly, the letters approving these two guarantees emphasized that they were exceptions to the FmHA's policy, taken only to prevent hardship to the borrower, and that the FmHA's position was in no way modified by the two renewal

guarantees.

Third, defendants argue that the regulations had been applied, in the past, only to contractors and builders, - - - never to banks seeking loan guarantees. This is, I believe, a reasonable construction on the basis of past practice within the FmHA and its own interpretation of its regulations. However, the plain language of the regulations indicates an application to this situation. Title 7, Code of Federal Regulations, Section 1980 contains the "general regulations and prescribed forms which are applicable to [FmHA] guaranteed loan programs ...". 7 C.F.R. §1980.1 (1980.1 (1988). In a subsection entitled "Debarment," it references Part 1924, Subpart E of "this Subchapter," which contains the debarment regulations quoted above. Id. at

§1980.13(b) (5). All such referenced Subparts of §1980 apply to lenders. Id. at §1980.1.

Finally, and significantly, defendants point out that the effect of the defendants' actions was (and is) much narrower in scope than provided for in the debarment regulations. Defendants did not place BJC's name on a nationwide FmHA debarment list, as required by Section 1924.220(b)(1). Nor did it give BJC's name to other federal agencies with similar lists, as required by Section 1924.220(b)(2). The June 1, 1988, letter only affected the Florida FmHA. Indeed, BJC continued to receive guarantees from the Alabama FmHA after the letter was written. After reviewing the June 1, 1988, letter and determining that it "was not a debarment," the Alabama FmHA decided

it could continue to do business with BJC. See doc. 125, Ex. 1 (affidavit of Dale N. Richey, Alabama FmHA State Director). Thus, the defendants contend that it was not a "debarment" within the meaning of the regulations.

This contention pits the definitional provision in the regulation against other regulatory aspects of "debarment." the facts of this case fall within the regulations' definition of debarment. On the other hand, the defendants did not impose many of the adverse measures upon BJC that were provided for by the regulations in case of debarment. Nevertheless, the definitional provision must prevail. Since a bank can ordinarily participate only in its local area [see 7 C.F.R. §1980.13(a)], a de facto debarment, even if limited to Florida, is a serious

matter for BJC. The mere fact that all of the debarment measures were not implemented and that the defendants were keeping the action "in-house,"[5] does not vitiate either the effect upon BJC or the regulations' own inclusion of this action within a debarment. Moreover, the Alabama FmHA's determination that this was not a debarment was made only in the context of deciding whether it could continue to work with BJC; it was not considering whether BJC was entitled to regulatory procedures.

In making this interpretation, I am

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[5] I note that one district court has relied on the absence of a government-wide or agency-wide ban in rejecting a claim of de facto debarment. See Arrow Air, Inc., v. United States, 649 F. Supp. 993, 999 (D.D.C. 1986). However, that court also emphasized that the government action in that case limited its effect to disqualifying the contractor with respect to only one contract. Id. & n.10. The effect on BJC in this case extends well beyond a single contract.

guided by the analysis employed by courts deciding what process is constitutionally due, independent of any applicable regulations with private contractors. Although I do not believe that a constitutional due process analysis is necessary or appropriate in this case,[6] these cases provide useful discussion on what constitutes "debarment." They stem from the original decision in Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), where the court explained the need for procedural due process standards regarding "[d]isqualification from bidding or contracting" with the federal government. Id. at 578. This decision, and the cases that followed it, led to the development of debarment regulations at many federal

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[6] See the analysis of the Gonzalez line of cases at the beginning of the qualified immunity discussion, below.

agencies.[7]

Importantly, the cases reflect a practical analysis of the effect of the government action on the business involved, rather than the nomenclature distinction employed by the government. A number of courts have looked past government representations to find what they term "de facto debarment."

In Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1259 (2d Cir. 1975), for example, the court dealt with postal regulations employing a definition of "debarment" almost identical to the one in this case. The asserted debarment in Myers was less explicit than the one in this case. After 26 years of

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[7] In my view, the subsequent undermining of the apparent rationale of Gonzales (see footnote 6) casts doubt on the further need for extensive debarment regulations at federal agencies.

contacting with a trucking company, the Postal Service failed to renew six trucking route contracts, citing a determination that the company was a "not responsible" bidder. Id. at 1254. The Second Circuit ruled:

> The fact that the Service did not label its action as a "debarment" is inconsequential, for the Service cannot bypass these important procedural safeguards merely by omitting the formal label to the sanction applied.
>
> Id. at 1259.

See also Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953, 962 (D.C. Cir. 1980) (finding of de facto debarment probably justified by the successive denial of a number of contracts on which the contractor was low bidder); Shermco Indus., Inc. v. Secretary of the Air Force, 584 F.Supp. 76, 91 (N.D. Tex. 1984) (finding of de facto suspension

warranted once "the procuring body" decides that "from that point forward it would award no further contracts").

Defendants distinguish the cases dealing with contractors on the basis that banks are "regulated with unique limitations placed on their activities." Doc. 125, at 6. I agree that banks are regulated enterprises, unlike contractors, and that there are obvious distinctions, but I find the contractor cases to be useful analogies to the extent that they hold that the agency's own determination that an action is not a "disbarment" is not conclusive of anything.

Accordingly, I find that the defendants debarred BJC without following the required regulatory procedure.[8]

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[8] In its motion in opposition to plaintiff's summary judgment motion, (continued...)

Injunctive relief is appropriate, as requested by the plaintiff. Accordingly, the plaintiff's motion is GRANTED, in part, and it is ORDERED that defendants rescind the effect of the June 1, 1988, letter and reinstate BJC as a viable participant in the Florida FmHA programs. Any further action to again discontinue doing business with BJC must come within the context of debarment procedures in accordance with FmHA regulations.

IV. DAMAGES.

(A). Availability of a Damages

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[8](...continued)
defendants argue briefly that they satisfied constitutional due process requirements because they "notified the Bank representatives each step of the way of what they were doing and why" and "met with the Bank representatives upon request." Doc. 125, at 8. The record does not support this. The letter of June 1, 1988, announced a fait accompli. Subsequent contacts with FmHA officials did not afford any serious opportunity for BJC to rebut the charges against it, etc.

Remedy. Plaintiff also claims damages from the defendants in their individual capacities. Initially, I must determine whether the plaintiff suffered a deprivation of a right, the violation of which gives them a claim for money damages. The violation of due process by federal officials certainly is such a right. See Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (damages remedy available for violation of the due process clause of the fifth amendment). However, I do not find that plaintiff has suffered a deprivation of constitutionally mandated due process in this case.

Plaintiff bases its claim that it has suffered a due process deprivation on Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), where the court explained the

need for procedural due process standards regarding "[d]isqualification from bidding or contracting" with the federal government. Id. at 578. In Gonzalez, former Chief Justice Burger, then sitting on the D.C. Circuit, wrote:

> Thus to say that there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person, or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts.

Id. at 574-575.

Finding no existing regulations governing contractor suspensions, the court mandated that such regulations be created and followed:

> Disqualification from bidding or contracting ... directs the power and prestige of government

> at a particular person and ... may have a serious economic impact on that person. Such debarment cannot be left to administrative improvisation on a case-by-case basis. The governmental power must be exercised in accordance with basic legal norms. Considerations of basic fairness require ... notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based on the record so made.

Id. at 578 (emphasis in original).

Gonzalez gave rise to a long line of cases instructing that before the government may place a private party on a business "blacklist," see Gonzalez, 334 F.2d at 574-575 (D.C. Cir. 1964), it must afford the party notice of the grounds for its action, an opportunity to rebut, and in most cases a hearing.

Although the broad language of Gonzalez implied a deprivation of property

basis, more recent cases have held that a government contractor has no constitutionally protected "property" interest in this situation, but in certain circumstances a "liberty" interest may be implicated where the suspension is based on charges of fraud or dishonesty, and some stigmatizing publication occurs. See ATL, Inc. v. United States, 736 F.2d 677, 683 (Fed. Cir. 1984); Transco Sec., Inc. v. Freeman, 639 F.2d 318, 321 (6th Cir.), cert. denied, 454 U.S. 820, 102 S.Ct. 101, 70 L.Ed.2d 90 (1981); Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953, 962 (D.C. Cir. 1980). Though plaintiff argues that it was accused of bad faith dealings in this case, the lack of any evidence in the record of outside publication of these accusations, even if they were sufficient

to trigger constitutional concerns, destroys any claim of a violated liberty interest. I therefore conclude that plaintiff has neither a property nor liberty interest upon which to base its claim.

Relying on Gonzalez in my previous order, I have assumed for purposes of the earlier summary judgment motion that such a property interest existed. Doc. 81, at 8. I now find that there is no constitutional bases for plaintiff's claim. However, as in the prior order, I note that defendants are legally bound to follow their own regulatory procedures, even where those procedures are not constitutionally mandated. See doc. 81, at 10, & cases cited therein. Under Payne v. Block, 714 F.2d 1510 (11th Cir. 1983), discussed supra, this entitles plaintiff

to injunctive relief.

But plaintiff has no basis for monetary damages unless it can establish that the FmHA regulations involved in this case expressly or impliedly provide a cause of action for damages for their violation. Specific authority for a damages remedy is required. As the Supreme Court has indicated:

> [It is not] always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials ... routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively."
>
> Davis v. Scherer, 468 U.S. 183, 196, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), quoting P. SCHUCK, Suing Government 66 (1983).

Plaintiff has cited no authority providing for a damages remedy for violations of the FmHA regulations involved here, and I am aware of none. Thus, plaintiff is entitled only to injunctive relief in this case. This conclusion makes consideration of the qualified immunity issue, briefed at length by the parties, unnecessary. However, as an alternative holding, I find that qualified immunity applies to the defendants in this case.

(B.) "Clearly Established" Law. I have already held that defendants are entitled to qualified immunity if they can meet the standard set out in Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). See doc. 81, at 5. Harlow indicates that defendants are qualifiedly immune unless their

conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Id. The right involved must be sufficiently clear that "in light of preexisting law the unlawfulness must be apparent." Waldrop v. Evans, 871 F.2d 1030, 1032 (11th Cir. 1989), citing Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Plaintiffs have the burden of showing that the officials violated such clearly established statutory or constitutional rights.

Courts evaluate an official's conduct under an objective, reasonable person standard. Malley v. Briggs, 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Qualified immunity is available "as long as their actions could reasonably

have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 107 S.Ct. at 3038. The doctrine is intended to balance society's interest in providing a remedy for injured victims and discouraging unlawful conduct against the interest in enabling public officials to act independently and without fear of the consequences. Harlow, 457 U.S. at 819. The question is one of law, and I am obligated to resolve it at the summary judgment stage if possible. Id. at 818; see also Waldrop v. Evans, 871 F.2d 1030, 1035 (11th Cir. 1989).

FmHA debarment regulations which applied by their terms to this action were in effect at the relevant time. It was also clearly established that federal officials are required to abide by their

own regulations. See, e.g., Morton and Payne, supra.

Officials are ordinarily charged with knowledge of the regulations and laws governing their official actions. Harlow, 457 U.S. at 818-819; see also Melton v. City of Oklahoma City, 879 F.2d 706, 731 (10th Cir.) reh'g granted in part, 88 F.2d 724 (10th Cir. 1989). This is especially true when the official is the head, or directly under the head, of a statewide division of the agency. Defendant Cherry is an attorney, admitted to the Florida bar since 1972; he had been director of the Florida FmHA for almost three years when he made the decision to stop doing business with BJC. Defendant Naeyaert has worked at FmHA since 1978. It is fair to expect that reasonable FmHA officials in these positions should be aware of the

regulations.

But for reasons discussed infra, these defendants could also be expected to know that FmHA's debarment regulations had never been applied to the lending institutions before. It is undisputed that the FmHA interpreted its own regulations as not applying to situations like the one presented in this case. An agency's interpretation of its own regulations is entitled to great weight.[9]

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[9]See Gardebring v. Jenkins, 485 U.S. 415, 430, 108 S.Ct. 1306, 99 L.Ed.2d 515 (1988) (unless compelled by the regulation's plain language or by other indications of the Secretary's intent, courts should hesitate to substitute an alternative reading for the agency's); Udall v. Tallman, 380 U.S. 1, 16, 86 S.Ct. 792, 13 L.Ed.2d 616 (1965) (great deference accorded agency's interpretation of its own regulation); Lollar v. Alabama By-Products Corp., 893 F.2d 1258, 1262 (11th Cir. 1990) (it is "well established" that courts must defer to an agency's consistent interpretation of its own regulation unless it is plainly erroneous).

The FmHA officials (other than the defendants) and the consulted Assistant United States Attorney were unaware that the regulations would require "debarment" procedures to be followed. Therefore, I find that the defendant's conduct did not violate "clearly established" rights "of which a reasonable person would have known." Harlow, supra, 457 U.S. at 818. The rationale underlying this conclusion is discussed in further detail below.

(1). Lack of Prior Application to Banks. First, defendants point out that defendants knew that similar actions against other banks had been taken without debarment procedures. See Naeyaert dep. at 74 (Naeyaert was told by Roger Witt, FmHA official in Washington D.C., that FmHA had "decided not to do business" with banks before). Further, they note, and

plaintiff does not dispute, that these FmHA debarment regulations had never before been applied to a bank. See doc. 125, at 10-11; id., Ex. 2 (affidavit of Gary Morgan, Director of Program Support Staff, FmHA).

Plaintiff has cited cases in which debarment procedures have been applied to banking institutions. See doc. 121, at 12 n.7, and cases cited therein. However, these cases involve federal agencies (the Department of Labor, the FDIC, and the Government National Mortgage Association) other than the FmHA. See, e.g., First Alabama Bank of Montgomery, N.A. v. Donovan, 692 F.2d 714 (11th Cir. 1982).

(2). Advice of Counsel. Defendants also argue that they relied on the advice of their superiors and their government counsel. Defendants maintain

that their "successors in interest" thought the actions proper. See doc. 110, at 12. Even if expressed to defendants, the opinions of the successors in interest, whoever they may be, are not necessarily indicative of the reasonableness of defendants' actions at the time those actions were taken. As I have previously noted, subjective good faith reliance on the advice of others is not determinative of qualified immunity, because an objective standard of reasonableness must be applied. The parties have argued at length about the effect of counsel's advice, and although I discuss here some of those arguments, I do not consider the advice of counsel as a distinct defense in this case. Nevertheless, it is evidence of what others similarly situated were aware of as

"clearly established," and is material to the qualified immunity defense.

The facts behind the advice of counsel are not disputed. On April 14, 1988, Benjamin Beard, an Assistant United States Attorney in Pensacola, Florida, wrote to Ted Elders, Office of General Counsel, Department of Agriculture, in Atlanta, Georgia. Beard's letter stated that Beard thought it:

> exceedingly unwise to enter into any financial transaction with [BJC] wherein the FmHA would have to rely on [BJC] officials to conduct servigin [sic; presumably "servicing"] and to deal honestly with the FmHA. In addition ... any such relationship would adversely affect [FmHA's ability to recover by civil suit.
>
> Beard dep., attachment to doc. 107, Ex. 3.

The letter, written five months before the government filed suit, does not make clear exactly how a continuing relationship

would prejudice the FmHA at trial.

This letter was written the same day that defendant Naeyaert orally instructed Holmes County FmHA Supervisory Audrey Sapp not to issue "anything on ... any other case to Bank of Jackson County." Id., at 7, ¶11. Beard has stated that, prior to sending this letter, he did not meet with or discuss the advice contained in the April 14, 1988, letter with anybody else at FmHA. Beard first spoke with anyone from FmHA about the advice in the letter sometime between April 15, 1988, and June 1, 1988.

Naeyaert has stated that, prior to the decision to stop doing business with BJC, he discussed that decision with Beard, Elders, and Witt. Cherry does not remember discussing the matter with anyone other than Naeyaert prior to making the

decision. Within the ten days before the June 1, 1988, letter was sent, Cherry and Naeyaert discussed the matter "on a few occasions." Pretrial stipulation, doc. 116, at 8, ¶15.

On May 5, 1988, Ted Elders wrote to Cherry. Referring to the earlier April 14 letter, Elders wrote that:

> [W]e concur with the suggestion by Mr. Beard that ... [FmHA] no longer enter into financial transactions with ... [BJC]. We would ask you give consideration to withdrawing, if possible, from any on-going transaction and declining to undertake any new transactions.

Id., at 9, ¶21.

Elders remembers speaking to Naeyaert at least once concerning the advice in his letter of May 5, 1988. That conversation occurred, according to Elders, after he received the April 14 letter from Mr. Beard and within a few days before he

wrote the May 5 letter to Cherry.

Beard, Elders, Cherry, and Naeyaert have no notes of any of their conversations concerning the decision to stop doing business with BJC. Beard and Elders both recall their conversations with Naeyaert as brief and essentially reviewing the substance of their letters. No one, including Beard, Elders, and Witt, discussed the debarment and suspension regulations with Naeyaert in connection with BJC, until after the filing of the instant case.

It is clear that reliance on counsel in certain circumstances can entitle a defendant to qualified immunity. See, e.g., V-1 Oil Co. v. Department of Envtl. Quality, 902 F.2d 1482, 1488 (10th Cir. 1990), cert. denied sub nom., V-1 Oil Co. v. Gerber, ____ U.S. ____, 111 S.Ct.

295, 112, L.Ed.2d 249 (1990). Whether such reliance defeats the imputation to a defendant of constructive knowledge of the laws allegedly violated depends upon the circumstances of each case. Id. at 1489. I only consider it as evidence that the regulatory procedure was not clearly established.

It is true that specific information regarding the debarment regulations was not provided to the attorneys. Neither Beard nor Elders referred to those regulations, and the defendants may have assumed that the attorneys were familiar with them (which, in fact, they were not). It is not unreasonable, however, to assume that government attorneys are, or should be, knowledgeable of the applicable law and regulations --- or at least know to check them.

I find the facts that the regulations had never before been applied to a bank, that the FmHA's own officials did not construe the debarment regulations as applicable, and that two separate attorneys advised the action without regard to any debarment procedure, eliminate all genuine issues of fact regarding whether defendants should have known that their conduct violated plaintiff's rights. See e.g., Green v. Brantley, 719 F. Supp 1570, 1584 (N.D. Ga. 1989). Taken together, they establish that defendants were objectively reasonable in acting the way they did.

Even though a close reading of the regulations indicates their applicability to lenders, defendants' failure to consider the regulations is understandable given the utter lack of precedent for

applying the regulations to a bank. Such a lack of precedent renders their conduct reasonable.

Additionally, the fact that the two attorneys' separate opinions bolstered the defendants' view provides further support for the reasonableness of their actions. Two experienced government counsel forcefully requested (if not instructed) defendants to take this course of action. It was not unreasonable for defendants to assume that such forceful advice from competent counsel could be relied upon especially since FmHA precedent gave no hint that this advice was in error. I conclude that there is no genuine issue of fact on this issue, and that defendants Cherry and Naeyaert are entitled to qualified immunity as a matter of law.

VI. CONCLUSION.

Defendants' motion for summary judgment is GRANTED as to the plaintiff's claim for damages, but plaintiff's motion is GRANTED as to its claim for injunctive relief. Defendants are ORDERED to nullify the effect of the June 1, 1988, letter suspending business relations with BJC and reinstate BJC as a viable participant in the FmHA programs. Any future decision to cease doing business with BJC must be taken pursuant to the debarment regulations. Judgment will be entered for plaintiff on the injunctive claim, and for defendants on the claim for damages.

Finally, resolution of these motions for summary judgment moots all other pending motions. Specifically, it renders academic the motion (doc. 122) to disqualify Benjamin Beard as counsel at trial, as he will not have to testify.

Accordingly, that motion is DENIED, as moot.

DONE AND ORDERED this 13th day of May, 1991.

/s/ Roger Vinson
ROGER VINSON
United States District Judge

Filed 1991 May 13 PM 4:25
Office of the Clerk
U.S. District Court
Northern Dist. of Florida
Pensacola, Fla

Entered on Docket 5/14/91

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

BANK OF JACKSON COUNTY,

Plaintiff,

v. Case No. 89-50062-RV

L. JAMES CHERRY and
RAYMOND G. NAEYAERT,

Defendants.

- - - - - - - - - - - - - - - - -

ORDER

Plaintiff, the Bank of Jackson County ("BJC"), filed suit alleging that the defendants, representatives of the Farmers Home Administration ("FmHA"), violated the bank's constitutional right in terminating the FmHA's business relationship with it in retaliation for an unrelated business dispute. Pending now is defendants' motion to dismiss, or in the alternative, for summary judgment. (Doc. 8) for the reasons stated below,

IN PART.

I. LEGAL STANDARDS AND FACTUAL BACKGROUND

A motion to dismiss for failure to state a claim cannot be granted unless the complaint alleges no set of facts, which, if proved, would entitle the Plaintiff to relief. See, e.g., Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80(1957). On a motion to dismiss, the court must accept all the alleged facts as true and find all inference from those facts in the light most favorable to the plaintiff. See, e.g., Cruz v. Beto, 405 U.S. 319, 92 S. Ct. 1079, 31 L.Ed.2d 263 (1972). Here, the parties have submitted material outside the pleadings, so I treat the defendants' motion as one for summary judgment.

A motion for summary judgment should

be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R. Civ.P. An issue of fact is "material" if it might affect the outcome of the case under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. See Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

On a summary judgment motion, the record and all inference that can be

drawn from it, must be viewed in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L.Ed.2d 176 (1962). Furthermore, the court must consider the entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. See Clinkscales v. Chevron USA, Inc., 831 F.2d 1565, 1570 (11th Cir. 1987).

It is undisputed that, in September 1981, BJC made an FmHA-guaranteed loan to dairy farmers Elmer and Shirley Ferris for the purchase of 46 dairy cows. After the Ferrises attempted to removed the milk cows from Florida, BJC in March 1982 obtained a writ of replevin and took possession of all the cows on the Ferris premises, including those pledged jointly

to BJC and FmHA. BJC and FmHA agreed to proceed jointly to sell the cows, and the proceeds from the sales were placed into a joint BJC-FmHA account.

In September 1984, BJC informed FmHA that it was applying money from the account to its debts. FmHA objected, and the dispute continued until September of 1986, when FmHA informed BJC that it would not negotiate with BJC further regarding allocation of the liquidation proceeds until BJC restored the withdrawn funds to the account.

In April 1988, Aubrey Sapp, the Holmes County Supervisor for FmHA, revoked an earlier approval of a loan made by BJC, "due to the dispute between" BJC and FmHA. On June 1, 1988, defendant James Cherry, then state director of the Florida FmHA, wrote a letter to BJC,

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stating that (1) the FmHA would not enter into any loan guarantees on BJC loans, and (2) the FmHA was terminating its treasury limited account with BJC because of the dispute between FmHA and BJC.

FmHA sued BJC regarding the Ferris milk cow dispute on September 9, 1988. On December 28, 1989, defendant Raymond Naeyart, then Chief of the Farm Programs for the federal FmHA, wrote the Jackson County FmHA. He instructed the personnel there to refuse approval on Charles Patrick's application for a guaranteed loan through BJC, because of the lawsuit and BJC's failure to negotiate in good faith. Finally, defendant Cherry told Thomas Wilder, President of BJC, that BJC would be "reinstated" once the suit was settled.

II. QUALIFIED IMMUNITY.

Notwithstanding defendants' arguments to the contrary, corporations may, under certain circumstances, sue government officials under Bivens theory for violation of constitutional rights. See Vance v. Universal Amusement Co., 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) (corporations may sue on first amendment claim); Hudson Valley Theatre, Inc. v. Heimbach, 671 F.2d 702 (2d Cir.) cert. denied, 459 U.S. 857, 103 S.Ct 127, 74 L.Ed.2d 110 (1982) (corporations can sue on Bivens theories generally).

Preliminarily, I find that the defendants were government officials acting pursuant to their discretionary authority with regard to the subject of this litigation. Therefore, they are entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800, 818,

102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Thus, defendants cannot be held liable unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Id. The right involved must be sufficiently clear that "in light of preexisting law the unlawfulness must be apparent." Waldrop v. Evans, 871 F.2d 1030, 1032 (11th Cir. 1989), citing Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Plaintiffs have the burden of showing that the officials violated such clearly established statutory or constitutional rights. Id.

Courts evaluate an official's conduct under an objective, reasonable person standard. Malley v. Briggs, 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d

271 (1986). Qualified immunity is available "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, supra, 107 S.Ct. at 3038. The doctrine is intended to balance society's interest in providing a remedy for injured victims and discouraging unlawful conduct against the interest in enabling public officials to act independently and without fear of the consequences. Harlow v. Firtzgerald, supra, 457 U.S. at 819.

The defendants asserts that they acted within the scope of their employment and in good faith, after consulting with in-house counsel, the U.S. Attorney's office, and their superiors in Washington, D.C. Under Anderson v. Creighton, supra, good faith

subjective reliance on the advice of attorneys or superiors is not determinative of qualified immunity, because an objective standard of reasonableness must be applied. See Malley v. Briggs, 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); Clark v. Evans, 840 F.2d 876, 881 (11th Cir. 1988). Nevertheless, such actions are evidence of objective reasonableness.

A. First Amendment Claim

BJC claims that the defendants terminated Florida FmHA's business relationship with it in order to force BJC's concession in the Ferris cow dispute and to prevent BJC from pursuing the dispute in court. In so doing, BJC argues, the defendants violated BJC's first amendment right to petition the

government for redress of grievances.[1] This right is subject to the same constitutional analysis as the right of free speech. Wayte v. U.S., 470 U.S. 598, 610 n.11, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985).

To show that defendants are not shielded by Harlow immunity, BJC must prove that it is clearly established that a federal agency's refusal to deal with a business because of its perceived recalcitrance in an unrelated business dispute is a violation of that business's first amendment rights. The only authority BJC cites for this proposition is Haynesworth v. Miller, 820 F.2d 1245,

---

[1] I note that BJC had not filed any claim with any court prior to the Florida FmHA's termination of business dealings with BJC. BJC has not alleged that any such claim was contemplated.

1255 (D.C. Cir. 1987), in which the District of Columbia Circuit held that first amendment Bivens actions were available as a remedy for retaliatory prosecutions designed to make plaintiffs agree not to pursue false arrest claims against the government.

However, this case does not involve a criminal prosecution, and I do not find Haynesworth v. Miller to be analogous. The unconstitutional nature of a threat of criminal action is more clearly established and understood by reasonable officials than the termination of a business relationship over a legitimate business dispute.

Somewhat similar to this case is McQueen v. Druker, 317 F. Supp. 1122 (D. Mass. 1970), aff'd, 438 F.2d 781 (1st Cir. 1971), cited with approval in

Roberts v. Cameron-Brown Co., 556 F.2d 356, 358 (5th Cir. 1977). In McQueen, the court found that a landlord of a federally subsidized housing project violated tenants' first amendment rights by evicting them for participating in tenants' rights organizational activities at the project. However, the defendant in McQueen has greater cause to know his conduct might run afoul of the first amendment, because tenants' rights organizational activity is more obviously activity afforded first amendment protection. In contrast, it is by no means obvious that a government official will violate a business's first amendment rights if, after unsuccessfully attempting to resolve a dispute over assets claimed by both parties, the official terminates the business

relationship. This is especially true in this case, where the evidence suggests that the dispute may reasonably have caused the defendants to fear that continued dealings with the plaintiff would lead to more protracted disputes.

Therefore, I find that with respect to the first amendment claim, defendants have not violated a "clearly established right" under Harlow. The defendants are entitled to qualified immunity from liability on the plaintiff's first amendment claim. Accordingly, defendants' motion is GRANTED as to this claim

B. Due Process Claim

I next turn to plaintiff's claim that the retaliatory termination of business dealings constituted a de facto "debarment" effected in violation of

procedural due process. Initially, I assume for purposes of the defendants' motion that Plaintiff does have a property interest in avoiding debarment. In Gonzales v. Freeman, 334 F.2d 570, (D.C. Cir. 1964), the District of Columbia Circuit held that debarment imposes such a serious economic injury on an existing participant in the Department of Agriculture's Commodity Credit Corporation that is must be done with constitutional procedural due process. Id. at 573-574.

Even though there is no "right" to contract with the government, the government cannot act arbitrarily in deciding which corporations become ineligible for dealings with the government. Id. See also Art Metal-USA, Inc. v. United States Postal Service, 753

F.2d 1151, 1160 (D.C. Cir. 1985); Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1258-1259 (2d Cir. 1975).

Defendants cite McCachren v. United States Department of Agriculture, 599 F.2d 655 (5th Cir. 1979), in which the former Fifth Circuit held that defaulting farmers had no property interest right to receive reorganization loans from the FmHA. However, the court in McCachren held that the borrowers' legal interest terminated upon default, and that since the loan agreement did not entitle them to a loan renewal, the borrowers had no property interest in starting up a new reorganizational loan. This is distinct from a situation where a bank has an existing and continuous business relationship which is affirmatively

discontinued by the federal agency.

In Lyng v. Payne, 476 U.S. 926, 106 S. Ct. 2333, 90 L.Ed.2d 921 (1986), the Supreme Court of the United States held that applicants for government benefits had no property interest in receiving them, but "those already receiving them" might. 106 S.Ct. at 2343.

Perhaps more importantly, here, a federal agency must abide by the procedure provided in its regulations, even though the regulations are more stringent than constitutionally required. Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055, 1074, 39 L.Ed.2d 270, 293 (1974); Payne v. Block, 714 F.2d 1510, 1517 (11th Cir. 1983).

I find that there is a genuine issue here regarding the violation of procedural due process rights. First, it

appears that the FmHA instituted a de facto debarment of BJC, regardless of the FmHA's characterization. FmHA's own regulations define "Debarment" as:

> . . . the exclusion from participation in any FmHA program for a reasonable period of time commensurate with the seriousness of the person's offense or failure, or the inadequacy of his performance.

9 C.F.R. §1924.203(b). BJC had a regular business relationship with FMHA in which it made loans guaranteed by FmHA. To be suddenly ad indefinitely excluded from participation in the loan program seems to constitute a debarment.

If this case involves a disbarment, there are regulations that govern the FmHA's debarment procedure. Before being debarred, a the FmHA's regulations provide that business is entitled to, inter alia: (1) notice of debarment proceedings, including a statement of

grounds for debarment; (2) an opportunity to file a written response; (3) a meeting with an FmHA representative to rebut the charges; and (4) written notification of the adjudication, including grounds for any adverse action taken. See 9 C.F.R. §1924.216(a)(3), (b)(1), (c), and (e)(1)-(3), respectively.

I conclude that there is a genuine factual dispute as to whether these procedure were followed. Indeed, by denying that plaintiff was in fact debarred, defendants may be acknowledging that they did not formally comply with the regulations cited above. Defendants contend that plaintiff has waived application of the debarment procedures because BJC President Wilder was aware of the procedures' availability, yet failed to request that FmHA follow its own procedure. How-

ever, there is evidence in the record indicating that Wilder did ask defendant Cherry about the debarment procedures in the regulations, but go no response.

Genuine issues of material fact exist which preclude summary judgment on the procedural due process claim, and the defendants' motion is DENIED.

DONE AND ORDERED this 20th day of March, 1990.

/s/Roger Vinson

ROGER VINSON
United States District Judge

Filed 1990 Mar. 20 PM 3:03
Office of Clerk
U.S. District Court
Northern Dist. of Florida
Pensacola, Fla

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

BANK OF JACKSON COUNTY,

Plaintiff,

v. Case no. 89-50062/RV

L. JAMES CHERRY and
RAYMOND G. NAEYAERT,

Defendants.

_____/

AFFIDAVIT

THOMAS W. WILDER, first being duly sworn, deposes and states as follows under penalties of perjury:

1. I am sui juris and over the age of eighteen years, and have personal knowledge of the facts set forth herein and the same are true and accurate.

2. I am the President and Chairman of the Board of the Bank of Jackson County.

3. The Bank of Jackson County has been a Florida state-chartered bank since 1934. The Bank is supervised by the Florida Department of Banking and is subject to credit examination by both Florida state and federal banking agencies. The Bank is in good standing with its licensing authority and has met licensing, loanmaking, loan servicing, and other requirements of the state of Florida. The Bank of Jackson County maintains offices in Graceville, FL, and Marianna, FL.

4. The Bank of Jackson County has been participating as an eligible lender in Farmers Home Administration programs since 1980.

HISTORY OF FMHA-BJC DISPUTE CONCERNING FERRIS-PERRY LOANS

5. In September, 1981, at the direct request of FmHA Holmes County Supervisor James Aubrey Sapp, I loaned dairy farmers Elmer and Shirley Ferris the money to purchase some forty-six (46) additional dairy cows. FmHA agreed as part of the loan agreement that the Bank would receive its monthly payments from the dairy cooperative ahead of the FmHA payments.

6. In March, 1982, I learned that the Ferrises had surreptitiously removed a substantial number of dairy cows to Michigan. Because of these actions, the Bank obtained a writ of replevin from a Florida circuit court in order to protect its collateral. When I accompanied the deputy sheriffs to execute the writ at the Ferris farm, I was joined by Mr. Sapp. Because the

borrowers were absent from the farm when we arrived and the animals had no feed, I suggested and Mr. Sapp agreed to have the Bank's trucks transport all of the cows and calves remaining -- including those pledged to the Bank and to FmHA.

7. Thereafter, the Bank and FmHA agreed that both would proceed jointly to liquidate the 132 cows removed by the Bank from the Ferris farm and to recover eighty-seven (87) cows moved to Michigan, with the Bank advancing all expenses. In several discussions between myself and Mr. Sapp and FmHA District Director Jerry Ausley, FmHA and the Bank agreed that, after the cows were retrieved from Michigan, the expenses would be accounted for and the net proceeds allocated to the FmHA and the Bank within the following parameters:

either in a ratio of the numbers of cows secured by each party or in a ratio of the amounts of the secured cattle loans owed each party by the Ferrises. These arrangements are confirmed in my April 4, 1982, letter to Mr. Sapp and in Mr. Ausley's July 9, 1982, letter to me. (True copies of these letters are attached to this affidavit as Exhibits A and B, respectively.)

8. As the Florida cows were sold in early 1982, the proceeds accumulated in an account at the Bank. Of the 132 animals removed from the Ferris farm, seventy (70) cows and three (3) calves were sold to Victor Perry by the FmHA; that sale was financed by a loan made by the Bank at the request of Mr. Sapp. During 1982 and 1983, the Bank attempted to recover the cows taken by

the Ferrises to Michigan, which efforts included litigation.

9. After initially offering to assist the Bank in Michigan, the FmHA ultimately refused to provide needed assistance in that litigation. For this reason, that litigation ended unsuccessfully in late 1983. Additionally, the next year, Victor Perry defaulted on the loan made to purchase the Ferris cows.

BJC EFFORTS TO SETTLE DISPUTE OVER DISTRIBUTION OF FERRIS-PERRY COW PROCEEDS

10. Since 1984, and although the pre-conditions for distribution have not occurred, the Bank has sought to equitably distribute the funds accumulated from the sale of the Ferris cows. Towards that end, I have

communicated repeatedly with officials from the FmHA. I have had numerous meetings with FmHA official, including a meeting with Defendant L. James Cherry, State Director of the Florida FmHA, Defendant Raymond G. Naeyaert, Chief of Farms Programs for the Florida FmHA, and other FmHA officials at the state office in Gainesville. The Bank has made several offers of settlement. The Bank has also offered to submit the matter for binding arbitration, which offer was flatly rejected by the FmHA. Additionally, I have indicated the Bank's willingness to have the matter resolved in a declaratory proceeding in a state or federal court.

11. From the first discussions concerning the Ferris-Perry cow proceeds, FmHA officials have reneged on the

parameters for distribution agreed to in 1982. Further, it was our perception that the state-level FmHA officials were not well-informed concerning the series of events involving the Ferris-Perry cow matter and were indifferent to our repeated attempts to explain the facts to them.

HISTORY OF DE FACTO DEBARMENT AND BJC RESPONSE

12. In early April, 1988, I learned from Thomas Heisler, the Executive Vice President of the Bank, that Mr. Sapp has telephoned the Bank the previous Friday afternoon. He had told Mr. Heisler that the application of Adron Miller for an FmHA-guaranteed loan to be made by the Bank of Jackson County, which had already been orally approved, would be disapproved because of the still

pending dispute over distribution of the Ferris-Perry proceeds. Mr. Sapp also stated that the FmHA District Director had informed him that the Homes County FmHA would not guarantee additional loans made by the Bank of Jackson County because of the dispute.

13. Without any further notice, on June 10, 1998, Mr. Heisler received a letter dated June 1, 1988, from Mr. Cherry, stating that the FmHA would no longer permit the Bank of Jackson County to participate as a lender in the guaranteed loan program in Florida and was terminating the FmHA's contract with the Bank as depository of a Treasury Limited Account. The letter stated the actions were taken because of the alleged refusal of the Bank to negotiate in the Ferris-Perry cow matter in good faith.

(A true copy of this letter is attached to this affidavit as Exhibit C.)

14. Between July, 1986, and the receipt of the telephone call from Mr. Sapp in 1988, the FmHA had not communicated with the Bank relating in any way to the Ferris-Perry cow dispute. Between that telephone call and the June 1, 1988, letter from Mr. Cherry some eight weeks later, there were no other communications from the FmHA relating in any way to the Ferris-Perry cow dispute. The de facto debarment of the Bank, first in Homes County, and then throughout the state of Florida occurred after period in excess of one and one-half years of complete silence from the FmHA on the Ferris-Perry distribution issue and following a period of considerable and apparently amicable activity between the

FmHA and the Bank.

15. On June 29, 1988, I discussed the matter of the de facto debarment of the Bank from participation in the loan program with Jerry W. Gerde, Esq., counsel for the Bank. I asked if there were any legal remedy for this move, which was taken without regard to the requirements of the FmHA regulations and appeared calculated to force a settlement of the Ferris-Perry cow money distribution on terms unfairly favorable to the FmHA. Mr. Gerde suggested that a civil rights action might be available as a remedy and advised that he would speak with other lawyers whom he believed might be knowledgeable in that area of the law.

16. Mr. Gerde subsequently spoke with those lawyers, Michel L. Stone, Esq., and Pamela Sutton, Esq., and

scheduled a meeting among the three lawyers, myself, and Thomas Heisler. This meeting occurred in Panama City, FL, on September 29, 1988, at 12:00 noon. The meeting resulted in our retaining Mr. Stone and Ms. Sutton to pursue the Bank's filing a lawsuit against the officials responsible for the de facto debarment of the Bank. During our discussions with counsel, we discussed whether the FmHA would ever bring suit against the Bank concerning the Ferris cow distribution and whether we ourselves should bring suit in order to finally resolve the matter. All counsel were instructed to consider that matter as well.

17. When we returned to the Bank after this meeting, we learned that the Bank had been served with a complaint filed on behalf of the FmHA and based on

the Ferris-Perry cow dispute. Although we subsequently learned that the suit had been filed some three weeks earlier, we were unaware of its existence until the summons and complaint were actually served on the Bank. It had been the Bank's intention since the day the June 1, 1988, letter form Mr. Cherry was received to take all legal steps to fight what the Bank considered to be an extortionate action and an abuse of power on the part of a federal agency.

FACTS DEMONSTRATING DEFENDANTS' TRUE MOTIVES BEHIND THE DE FACTO DEBARMENT AND DEMONSTRATING THE DAMAGES TO THE BANK RESULTING FROM DEBARMENT

18. From 1984 through June 1, 1988, the Bank of Jackson County continued its extensive participation in the federally guaranteed loan program of

the Farmers Home Administration. During that period, the FmHA in Florida had regularly guaranteed loans made and lines of credit extended by the Bank of Jackson County, with loans and lines of credit totalling some $1,065,990.95 during that period. Moreover, subsequent to the de facto debarment of the Bank by the Florida FmHA office, the Florida FmHA has approved advances on guaranteed lines of credit made by the Bank of Jackson County, for the stated reasons of preventing hardship to the borrower and because approval appeared to be in the best interest of the government and the borrower. (True copies of the letters from Mr. Cherry permitting these loans are attached to this affidavit as Exhibits D and E.)

19. In addition, the FmHA has

guaranteed loans made and lines of credit extended to farmers in Alabama by the Bank of Jackson County both before and after the June 1, 1988, letter from Florida State Director Cherry. No officials from the Alabama state or county offices of the FmHA have indicated any dissatisfaction with the Bank or any intention of debarring the Bank from participating in any programs of the FmHA in that state.

20. As a direct result of the actions taken by Mr. Cherry and the action later taken by Mr Naeyaert, the applications of Adron Miller and Charles Patrick for loans to be made through the Bank of Jackson County under the federally guaranteed loan program were rejected by the FmHA, resulting in the loss of revenues to the Bank of Jackson

County of approximately $255,000.00 over the period of the loans. (Both borrowers eventually obtained federally guaranteed loans through other lenders.) (A true and accurate copy of the letter sent by Mr. Naeyaert to Charles Snell, FmHA Jackson County Supervisor, disapproving Mr. Patrick's loan application is attached to this affidavit as Exhibit F.)

21. In the case of Adron Miller, since the FmHA had already orally approved the loan, the Bank of Jackson County had committed itself to, and therefore did, release collateral of the borrower already held by the Bank and required by FmHA as a condition of the loan. Thus, the Bank was further injured by impairing its collateral on an existing loan with Mr. Miller.

22. Mr. Cherry's cancellation

of the Treasury Limited Account resulted and will result in an estimated loss of approximately $2350.00 per year, based on figures derived from the year ending June 30, 1988, and assuming no change in the level of account activity or the prevailing interest rate. Additionally, the debarment has had a chilling effect on the Bank's ability to promote loan applications, since the Bank feels obliged to disclose to potential qualified borrowers that it cannot obtain FmHA guarantees as a means of loan approval.

23. The Bank of Jackson County derives a substantial portion of its revenues from loans made for agricultural purposes. During 1988 and 1989, farm loans comprised 20% to 25% of the Bank's total outstanding loans. These

percentages do not include certain loans secured by non-farm-related collateral the proceeds of which are used for agricultural purposes. Although the number and amount of the latter type of loans has not been calculated to date, that amount is significant and would substantially increase these percentages.

24. On May 5, 1989, I attended a function hosted by Congressman Bill Grant in honor of the United States Secretary of Agriculture, Clayton Yeutter. Mr. Cherry was present at the function. Mr. Cherry and I discussed settlement of the Ferris cow lawsuit. In the course of our discussion, I pointed out that, separate and apart from the issues in that case, he had "debarred" the Bank from participating in the federally guaranteed loan program without

giving the Bank a hearing as required in the FmHA regulations. He responded that, as soon as the Ferris cow case was "settled", the Bank would be "reinstated" as a participant in the federally guaranteed loan program.

FURTHER AFFIANT SAYETH NOT.

/s/ Thomas W. Wilder
THOMAS W. WILDER
AFFIANT

STATE OF FLORIDA:
COUNTY OF JACKSON:

Before me, the undersigned authority personally appeared Thomas Wingate Wilder, to me known, who executed the above affidavit and swore under penalties of perjury that its contents are true and accurate to the best of his information and belief.

Dated this 10th day of July, 1989.

/s/ Mary J. West
Notary

Notary Public State of Florida
My commission exp. Feb. 25, 1990
Bonded thru General Ins. Und.

[Exhibits attached to affidavit

have been omitted]

Filed as exhibit no. 1 to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment with the Office of the Clerk, U. S. District Court for Northern District of Florida, Pensacola, FL, on July 12, 1989

Supreme Court, U.S.
FILED
JUL 26 1993
OFFICE OF THE CLERK

No. 92-1895 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1993

BANK OF JACKSON COUNTY, PETITIONER

v.

L. JAMES CHERRY AND RAYMOND G. NAEYAERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in this suit for damages against respondents under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), the denial of future loan guarantees to petitioner by the Florida office of the Farmers Home Administration as a means of exerting pressure in a civil dispute violated a clearly established right of petitioner to petition the government for redress of grievances.

2. Whether the denial of future loan guarantees infringed a clearly established liberty interest of petitioner, in violation of the Due Process Clause of the Fifth Amendment.

3. Whether the denial of future loan guarantees infringed a clearly established property interest of petitioner, in violation of the Due Process Clause of the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1895

BANK OF JACKSON COUNTY, PETITIONER

v.

L. JAMES CHERRY AND RAYMOND G. NAEYAERT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on rehearing, Pet. App. A2-A48, is reported at 980 F.2d 1362. The original opinion of the court of appeals, Pet. App. A49-A97, is reported at 980 F.2d 1354. The opinions of the district court, Pet. App. A98-A169, are unreported.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on January 11, 1993. The petition for a writ of certiorari was filed on April 12, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is an action for damages against two officials of the Florida office of the Farmers Home Administration (FmHA-Florida) in their individual capacities under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Respondent L. James Cherry was the Florida State Director of FmHA. Respondent Raymond G. Naeyaert was FmHA's Florida Chief of Farmer Programs. The claims of petitioner Bank of Jackson County (Bank) arise out of respondents' determination to have FmHA-Florida cease providing guarantees of loans made by petitioner. Pet. App. A98-A99, A110.

In 1981 petitioner made a loan to two dairy farmers, Elmer and Shirley Ferris, to enable the Ferrises to purchase dairy cows. Under the terms of loans that FmHA-Florida had previously made to the Ferrises, FmHA-Florida also had a security interest in the Ferrises' cattle.[1] In March 1982, after the Ferrises began removing cows from Florida in violation of the loan terms, petitioner obtained a writ of replevin and took possession of the remaining cows. Petitioner and FmHA-Florida agreed to sell the cows, and the sale proceeds were placed in an account at the Bank jointly held by FmHA-Florida and petitioner. Pet. App. A3-A4, A153-A154.

In September 1984, petitioner withdrew funds from the joint account in order to extinguish debts owed to petitioner by another farmer. Upon learning of the withdrawal, FmHA-Florida objected. Two years later, in September 1986, FmHA-Florida in-

[1] Aff. of Raymond G. Naeyaert ¶¶ 2-3, attached to Gov't Mot. to Dismiss or in the Alternative for Summ. Judgment (N.D. Fla. June 21, 1989).

formed petitioner that it would not negotiate with petitioner concerning the allocation of funds in the account until petitioner returned the funds it had withdrawn. Pet. App. A154. In April 1988, respondent Naeyaert instructed the supervisor of the FmHA office in Holmes County, Florida, to refrain from guaranteeing any more loans made by petitioner because of the dispute over the proceeds from the sale of the repossessed cows. *Id.* at A111. On June 1, 1988, respondent Cherry sent a letter, drafted by Naeyaert, to the Bank's Executive Vice President informing the Bank that, although FmHA-Florida would honor existing loan guarantees, it was closing the federal government's treasury limited account at the Bank and would not guarantee future loans made by petitioner because of the Bank's refusal to negotiate in good faith concerning the Ferris cow dispute. *Id.* at A111-A112.

On September 9, 1988, because the dispute remained unresolved, FmHA filed suit against petitioner in the United States District Court for the Northern District of Florida to recover the agency's share of the proceeds from the sale of the cows. While that suit was pending, Naeyaert, in a letter dated February 28, 1989, instructed the supervisor of the FmHA office in Jackson County, Florida, to refuse to guarantee a loan made by petitioner because of the unresolved dispute then in litigation and petitioner's failure "to negotiate in 'good faith.' " Pet. App. A9-A10, A113, A115, A155.

2. Meanwhile, petitioner commenced this *Bivens* action against Cherry and Naeyaert. Petitioner alleged that respondents' refusal to conduct further business relations with the Bank constituted a de facto debarment; that respondents had failed to fol-

low the procedures set forth in FmHA's debarment regulations; and that respondents had violated petitioner's due process rights. Petitioner also alleged that respondents had attempted to coerce the Bank into a favorable resolution of the Ferris loan dispute in violation of petitioner's First Amendment right to petition the government for redress of grievances. Petitioner sought compensatory and punitive damages, costs, and attorney's fees against Cherry and Naeyaert in their individual capacities for the alleged violation of petitioner's constitutional rights.[2] Pet. App. A11-A12.

On March 20, 1990, the district court granted summary judgment to respondents with respect to petitioner's First Amendment claim, finding that respondents are entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The court noted that "it is by no means obvious that a government official will violate a business's first amendment rights if, after unsuccessfully attempting to resolve a dispute over assets claimed by both parties, the official terminates the business relationship." Pet. App. A162-A163. The court further noted that "[t]his is especially true in this case, where the evidence suggests that the dispute may reasonably have caused the [respondents] to fear that continued dealings with the [petitioner] would lead to more protracted disputes." *Id.* at A163.

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[2] Petitioner also sought a declaration that respondents, in their official capacities, had failed to comply with the debarment regulations and had violated petitioner's constitutional rights. Petitioner sought injunctive relief to prohibit FmHA-Florida from continuing to refuse loan guarantees in transactions involving petitioner. Pet. App. A12.

On May 14, 1991, the district court denied petitioner's remaining claims for damages under the Due Process Clause, holding that petitioner was not deprived of any constitutionally protected property or liberty interest and that respondents are, in any event, entitled to qualified immunity. Pet. App. A126-A147. The court, however, entered an order granting petitioner injunctive relief on the basis of perceived violations of FmHA's debarment regulations.[3]

3. The court of appeals affirmed. Pet. App. A2-A48.[4] With respect to petitioner's due process claim, the court held that petitioner had no claim of entitlement to FmHA loan guarantees and therefore suffered no loss of a constitutionally protected property interest. Pet. App. A17-A20. The court also concluded that petitioner had not been deprived of a liberty interest. *Id.* at A20-A34. The court assumed, without deciding, that respondents' suggestion that petitioner had acted in bad faith "constituted a stigmatizing allegation." *Id.* at A26. The court concluded, however, that the suggestion of bad faith conduct "was neither sufficiently publicized, nor sufficiently injurious, to deprive [petitioner] of liberty under the Due Process Clause." *Ibid.*

Finally, the court of appeals rejected petitioner's claim under the First Amendment, concluding that respondents are entitled to qualified immunity. The

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[3] Respondents did not seek appellate review of the district court's award of injunctive relief against them in their official capacities. Pet. App. A13.

[4] The opinion of the court of appeals issued on rehearing superseded an earlier opinion that had been rendered by the same panel on July 27, 1992. Pet. App. A49-A97.

court explained that respondents' denial of future FmHA loan guarantees to gain leverage in the civil dispute over the proceeds from the sale of the Ferrises' cows did not deprive petitioner of a clearly established right to petition the government for redress of grievances. Pet. App. A34-A45.[5]

ARGUMENT

1. Petitioner contends (Pet. 27-39) that respondents' decision to stop issuing loan guarantees to the Bank in order to induce it to settle the civil dispute over the proceeds from the sale of the Ferrises' cows interfered with petitioner's right of access to the courts, in violation of what petitioner argues were its clearly established First Amendment rights. That claim lacks merit.

In asserting a First Amendment violation, petitioner relies (Pet. 30 & n.4) on retaliatory prosecution cases in which a government official initiates, or threatens to initiate, criminal proceedings against an individual if the individual does not agree to refrain from filing a civil action against the government or its employees. See, *e.g.*, *Haynesworth* v. *Miller*, 820 F.2d 1245, 1255-1257 (D.C. Cir. 1987); *Sexton* v. *Ryan*, 804 F.2d 26 (2d Cir. 1986) (per curiam).

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[5] Judge Godbold filed a concurring opinion. He joined the court's opinion finding that petitioner was not deprived of a protected property interest. He also concluded that petitioner had not suffered any deprivation of a liberty interest, because petitioner's lending activities were not significantly impaired. Finally, he concluded that petitioner's First Amendment rights were not violated. Judge Godbold explained that, even though FmHA-Florida had terminated petitioner's loan guarantees to gain leverage in the Ferris cow dispute, petitioner did not in fact settle but enjoyed its right of access to the courts. Pet. App. A46-A48.

Those cases, however, do not establish that respondents engaged in unconstitutional access-barring activity. As the court of appeals recognized (Pet. App. A40-A41), the denial of additional loan guarantees from FmHA-Florida involves none of the uniquely coercive consequences that flow from a government official's threat to commence a criminal prosecution. Moreover, the government conduct under challenge here "had many legitimate objectives" (*id.* at A42)—including the protection of the public fisc through recovery of the government's rightful share of the proceeds from the sale of collateral—that were not present in the cases on which petitioner relies.

Petitioner contends (Pet. 34) that the retaliatory prosecution cases involved "a similar benefit to the public fisc" because the government conduct under challenge in those cases was designed to deter lawsuits against law enforcement officials. But here, "[t]he government sought to protect the taxpayers' interest, without protracted litigation, in collateral to which [the taxpayers] had more than a colorable claim." Pet. App. A42-A43. Such good faith conduct is far removed from that involved in the retaliatory prosecution cases, in which the "benefit to the public fisc" results from an attempt to coerce an individual into agreeing not to pursue colorable claims of government misconduct.[6]

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[6] For similar reasons, petitioner's reliance (Pet. 34-35) on *Matzker* v. *Herr*, 748 F.2d 1142, 1150-1151 (7th Cir. 1984)—involving a prison official's refusal to transfer a prisoner to a safer cellblock in retaliation for the prisoner's complaints to a judge about his conditions of confinement—is also misplaced. As the court of appeals noted, Pet. App. A43-A44 n.1, "the prison officer in *Matzker* had no legitimate purpose in seeking to force the prisoner to abandon his claim."

Even if it is assumed that the First Amendment should be extended to regulate respondents' conduct, the decisions cited by petitioner provided no basis for respondents "reasonably [to have] anticipate[d]" that their conduct could provide a basis for an award of damages against them. *Anderson* v. *Creighton*, 483 U.S. 635, 646 (1987), quoting *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984). Accordingly, the court of appeals correctly determined that respondents are entitled to qualified immunity.

2. Petitioner also contends (Pet. 39-56) that respondents' denial of future loan guarantees effected a deprivation of a clearly established liberty interest, in violation of the Due Process Clause of the Fifth Amendment. That fact-bound claim is incorrect and does not warrant this Court's review.

Under the liberty-interest theory that petitioner invokes (Pet. 39-42), a party must demonstrate a " 'stigmatizing' governmental defamation having an immediate and tangible effect on its ability to do business." *Old Dominion Dairy Prods., Inc.* v. *Secretary of Defense*, 631 F.2d 953, 962-963 (D.C. Cir. 1980); *Transco Sec., Inc.* v. *Freeman*, 639 F.2d 318, 321 (6th Cir.), cert. denied, 454 U.S. 820 (1981). Petitioner asserts (Pet. 40) that it suffered the requisite "stigma" when it "was charged * * * with a lack of integrity for failing to deal in good faith with" FmHA-Florida to resolve the business dispute concerning the proceeds from the sale of the cows repossessed from the Ferrises. Petitioner further contends (*ibid.*) that "[t]his stigma was accompanied by a loss of business opportunity, namely, [FmHA-Florida's] refusal to entertain the Bank's future applications for FmHA loan guarantees."

The court of appeals correctly found, on the facts here, that petitioner did not experience the deprivation of a liberty interest protected under the Due Process Clause. Respondents did not communicate to the general public any allegations concerning the Bank's failure to deal in good faith. *Bishop* v. *Wood*, 426 U.S. 341, 348 (1976) (discharge of public employee, terminable at will, did not infringe any liberty interest where reasons for the discharge were not publicly disclosed). Nor did respondents communicate such allegations to other FmHA offices or to any other government agency. Compare *Old Dominion*, 631 F.2d at 955-956, 959, 963-964, 966 n.24 (deprivation of liberty interest occurred where government contractor was found to lack integrity and that determination was communicated through official government channels and resulted in contractor's suspension from bidding on all contracts with Department of Defense); *Larry* v. *Lawler*, 605 F.2d 954, 958 (7th Cir. 1978) (deprivation of liberty interest found where government employee was "stigmatized throughout the entire federal government"). Although personnel at FmHA-Florida were made aware of petitioner's failure to negotiate a good faith settlement of the Ferris loan dispute so that they would implement respondents' decision to deny petitioner access to future loan guarantees from FmHA-Florida, FmHA-Florida did not place petitioner on any agency-wide or government-wide debarment list or otherwise bar petitioner from obtaining loan guarantees from FmHA offices in other States or from other government agencies. In fact, petitioner remained free to obtain, and did obtain, loan guaran-

tees from FmHA's Alabama office. Pet. App. A30-A31.[7]

In these circumstances, petitioner failed to establish that its liberty to do business free from stigmatizing injury was infringed by respondents' actions. The Due Process Clause protects against government-created stigma, in connection with adverse government action, that significantly impairs a person's freedom to engage in future employment or financial opportunities.[8] It does not, as petitioner suggests,

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[7] In addition, FmHA-Florida renewed guarantees of two separate loans made by petitioner—although FmHA-Florida noted that those guarantees were renewed for the benefit of the borrowers, not petitioner, and they were not to be understood as modifying the policy announced in the June 1, 1988, letter. See Pet. 19-20; Pet. App. 10a.

[8] The court of appeals decisions cited by petitioner (Pet. 39, 42, 46) establish no more. See, *e.g.*, *Old Dominion*, 631 F.2d at 955-956 (due process protection applies when government "effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity"); *Bartel* v. *Federal Aviation Admin.*, 725 F.2d 1403, 1414-1415 (D.C. Cir. 1984) (individual's opportunities for future government employment in his field were severely restricted); *ATL, Inc.* v. *United States*, 736 F.2d 677 (Fed. Cir. 1984) (broad suspension from bidding on government contracts); *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092, 1104-1105 (D.C. Cir. 1985) (cloud over future employment as attorney). In *Reeve Aleutian Airways, Inc.* v. *United States*, 982 F.2d 594, 595, 598 (D.C. Cir. 1993), the court of appeals concluded that temporary suspension from a military airlift transportation program constituted a significant deprivation of liberty, even though the airline remained free to seek business elsewhere. Although, compared to prior cases, *Reeve* reduced the quantum of injury needed to establish interference with a protected liberty interest, *id.* at 598, that case is of no assistance to petitioner. As the court noted

encompass a "liberty" to continue enjoying access to the very government benefits that are being denied. *Bishop* v. *Wood*, 426 U.S. at 343, 348 (termination of police officer for insubordination, causing low morale, and engaging in unbecoming conduct did not implicate liberty interest); *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972) (no liberty interest at stake where plaintiff did not allege that the "State, in declining to re-employ [him], imposed on him a stigma or other disability that foreclosed his freedom to take advantage of *other* employment opportunities") (emphasis added); *Sutton* v. *United States Dep't of Housing & Urban Dev.*, 885 F.2d 471, 475 (8th Cir. 1989) ("nonrecertification, the reasons for which were not made public, does not impose a stigma or foreclose [the appraiser] from seeking appraisal work outside the HUD referral system"), cert. denied, 493 U.S. 1075 (1990).

Here, petitioner has not alleged that respondents' conduct resulted in any cognizable stigma that significantly impaired petitioner's ability to take advantage of other business opportunities.[9] Although

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in *Reeve*, "branding an airline unsafe creates a lasting blemish on a company's reputation." *Ibid.* Moreover, even if *Reeve* represents a correct extension of the law concerning liberty interests, respondents could not reasonably have anticipated that extension in 1988 and 1989, when the events giving rise to this *Bivens* action took place. Accordingly, *Reeve* does not undermine respondents' entitlement to qualified immunity.

[9] Petitioner errs in suggesting (Pet. 44-47) that any decision by it to disclose to its customers the reason for respondents' refusal to provide additional loan guarantees would constitute a "stigmatizing" injury attributable to the government. The consequences of petitioner's voluntary decision to

petitioner was denied access to FmHA-Florida loan guarantees, its ability to pursue business opportunities with, or obtain benefits from, individuals or groups (public or private) other than FmHA-Florida remained unaffected. Petitioner was able to obtain loan guarantees from other offices within FmHA and was free to apply for any government benefit and do business with any other government agency or private party. The concept of an impairment of "liberty" does not embrace a purported stigmatizing injury with respect to the limited foreclosure of business opportunities that occurred here.

3. Finally, petitioner argues (Pet. 56-64) that it had a clearly established property interest in receiving loan guarantees from FmHA-Florida. That is incorrect. The law in fact is clearly established that the interest in contracting with the government constitutes "an abstract need or desire," not a "legitimate claim of entitlement" that constitutes protected property. *Board of Regents* v. *Roth*, 408 U.S. at 577; *Associated Builders & Contractors, Inc.* v. *City of Seward*, 966 F.2d 492, 499 (9th Cir. 1992), cert. denied, 113 S. Ct. 1577 (1993); *Smith & Wesson* v. *United States*, 782 F.2d 1074, 1081 (1st Cir. 1986); *Eastway Constr. Corp.* v. *City of New York*, 762 F.2d 243, 249-250 (2d Cir. 1985); *Arrow Air, Inc.* v. *United States*, 649 F. Supp. 993, 999 (D.D.C. 1986). Accordingly, those who are suspended from doing business with the government are not deprived of any property interest that is protected under the Due

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reveal FmHA-Florida's doubts about its good faith to its customers are not the result of government action. Pet. App. A31 ("[T]he government imposed no duty upon [petitioner] to disclose the *reason* for its debarment.").

Process Clause. *Sutton* v. *United States Dep't of Housing & Urban Dev.*, 885 F.2d at 474; *ATL, Inc.* v. *United States*, 736 F.2d 677, 683 (Fed. Cir. 1984); *Transco Sec., Inc.* v. *Freeman*, 639 F.2d at 321.

Petitioner acknowledges those cases (Pet. 62), but contends that they ignore the analysis of an earlier court of appeals decision, *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964). As the court of appeals in this case recognized, however, *Gonzalez* is inapposite. Pet. App. A19-A20. The plaintiffs in *Gonzalez* had been debarred from participating in any program financed by the Commodity Credit Corporation. The court held that the debarment was contrary to statute and noted that to conclude otherwise would raise "serious constitutional issues." *Gonzalez* v. *Freeman*, 334 F.2d at 579. *Gonzalez*, however, did not state that any constitutionally protected property right was at stake. On the contrary, in discussing the contractor's standing to sue, the court acknowledged that "[o]f course" a government contractor does not have a "legal right"—*i.e.*, a property right—to the contracts for which it bids. *Id.* at 574. The better reading of *Gonzalez* is that the "serious constitutional issue[]" that the court perceived arose from the impact of the government's action on what might have been a protected *liberty* interest. See *Myers & Myers, Inc.* v. *United States Postal Serv.*, 527 F.2d 1252, 1258 (2d Cir. 1975) (following *Gonzalez* and suggesting that a stigimatizing debartment may interfere with "economic liberty"). Nothing in *Gonzalez* supports the inference of a protected *property* interest. See *Old Dominion*, 631 F.2d at 962 (noting that, under *Gonzalez*, a contractor has standing to

challenge debarment, even though it "had no 'property' interest in the contract awards").[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] To the extent that *Gonzalez* is read to suggest that government contractors have a property interest in bidding for future business with the government, it is inconsistent with the analysis of *Board of Regents* v. *Roth*, 408 U.S. at 577, which makes clear that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." See *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 (1985). The *Gonzalez* court did not purport to identify any "rules or understandings" that entitled the contractor there to enjoy future government business. Nor does petitioner make such a showing here.

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